No. 21307

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD., ET AL
UNION TANK CAR COMPANY
WARD INDUSTRIES CORPORATION, now known as DRAGOR SHIPPING CORPORATION,
Appellants
Cross Appellees

vs.

U.S.A., EX REL MOSHER STEEL COMPANY,
Appellee
Cross Appellant

No. 21307
No. 21307 A
No. 21307 B
No. 21307 C

BRIEF OF APPELLANT UNION TANK CAR COMPANY

Harold C. Warnock
Thomas C. McConnell
John Borst, Jr.
Boyle, Bilby, Thompson & Shoenhair
9th Floor
Valley National Building
Tucson, Arizona 85701

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BRIEF OF APPELLANT UNION TANK CAR COMPANY

Upon Appeal from the District Court of the United States for the District of Arizona

This is an appeal by defendant Union Tank Car Company (Union) from judgments requiring Union to pay plaintiff Mosher Steel Company (Mosher) $268,882.92 for steel fabrication work undertaken for the defendant Ward Industries Corporation (Ward) and its joint venturer Idaho-Maryland Industries, Inc. (IMI). The material fabrication was ordered by the joint venture for use in performance of a second-tier subcontract with Union on the missile launch facilities, Titan II, Phase II, constructed near Tucson, Arizona and Lompoc, California. Union paid the joint venture

for the steel fabrication work but neither Ward nor IMI ever paid its subcontractor Mosher. Now the court below has held that Union is liable to pay for the same steel work a second time.

JURISDICTIONAL STATEMENT

The jurisdiction of the court below with respect to Mosher's claim for relief against Union was based on diversity of citizenship, the amount in controversy exceeding $10,000 (28 U.S.C. § 1332). Mosher is a Texas corporation having its principal place of business in the State of Texas (R. 268, 1220).[1] Union is a New Jersey corporation having its principal place of business in the State of Illinois (R. 272, 1221).

On May 24, 1966, the court below entered findings of fact and conclusions of law and a judgment holding Union and Ward liable to Mosher in the amount of $268,882.92 as payment for the steel Mosher fabricated and delivered to the IMI-Ward joint venture (R. 1220, 1241). The court in the same judgment also held Fluor Corporation, Ltd. (Fluor) and its sureties liable to Mosher for $246,165.96 under the provisions of the Miller Act, 40 U.S.C. §§ 270(a) and (b). On June 2, 1966 Union filed a motion requesting the court below to amend and make additional findings of fact and conclusions of law, to alter and amend the judgment, or to grant a new trial (R. 1242, 1244). The motion was denied on June 20, 1966 (R. 1695).

[1] The following abbreviations are employed in this brief: R. for Record on Appeal; R.T. for Reporter's Transcript of Proceedings. Counsel prior to trial stipulated to the admission in evidence of certain documents as joint exhibits identified herein as Jt.Ex. The remaining exhibits introduced in evidence by Mosher, Ward, and Union are respectively identified as M.Ex., W.Ex., and U.Ex. See exhibit appendix at conclusion of brief.

On June 20, 1966, the court below entered a second judgment denying Union's counterclaim (R. 1345). The counterclaim prayed that in the event Union as well as Ward were held liable to Mosher, plaintiff be required first to seek satisfaction of any judgment from Ward as the defendant primarily responsible for payment of Mosher's claim (R. 295). The court entered no findings of fact or conclusions of law in dismissing the counterclaim.

Union filed a notice of appeal from each of the above judgments on July 18, 1966 (R. 1371). Jurisdiction of this Court to review the judgments of the court below is invoked pursuant to 28 U.S.C. §§ 1291 and 2107 and Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Contractual Relationships Between Defendants

In June, 1961, Union's Graver Tank & Mfg. Co. Division received two first-tier subcontracts for Phase II work on the Titan II missile launch facilities under construction in Arizona and Southern California. One contract, in the amount of $16,500,000 was awarded by Fluor and covered work at Davis-Monthan Air Force Base, Tucson, Arizona (Jt.Ex. 2). The second contract, in the amount of $2,600,000 was awarded by Matich Bros. and M. M. Sundt Construction Corporation (Matich-Sundt) and covered work at Vandenberg Air Force Base, Lompoc, California (Jt.Ex. 4). The subcontracts were initially evidenced by interim agreements under which the work was performed until formal contract documents were prepared and executed on September 8, 1961.

Following the awards, Ward and IMI agreed to organize a joint venture for the purpose of undertaking

a second-tier subcontract for Union's Graver Division covering a substantial portion of the steel fabrication work included under Graver's contracts with Fluor and Matich-Sundt (U.Ex. A). IMI was a California based construction company with its principal place of business at Studio City (U.Ex. A). It also operated a steel fabrication plant at Denver, Colorado known as its Denver Steel & Iron Division (W.Ex. A-1 through A-4).

The IMI-Ward joint venture was established on July 28, 1961, with the execution of a joint venture agreement (U.Ex. B, Jt.Ex. 7). It provided that the obligations of the venturers under their subcontract with Graver would be joint and several and that they would share equally in any profits, losses, or liabilities of the enterprise (Jt.Ex. 7). It also provided that the joint venture affairs would be conducted by a committee composed of IMI and Ward representatives. Subject to the direction of the committee, performance of the work was placed under the control and direction of IMI's president, George J. Morton, who was designated joint venture manager (Jt.Ex. 7).

On August 23, 1961, IMI and Ward executed a letter agreement with Graver, covering the second-tier subcontract work undertaken by the joint venturers (U.Ex. S). The letter agreement, like Graver's interim agreements with Fluor and Matich-Sundt, was subsequently replaced by a formal subcontract document executed as of October 23, 1961 (Jt.Ex. 8). The subcontract provided that IMI-Ward was to receive from Graver as the contract price the sum of $8,524,000 less the cost of Graver-supplied material (Jt.Ex. 8). Of this sum, $7,971,000 was applicable to work at Davis-Monthan and the balance of $553,000 was applicable to work at Vandenberg (R. 1223). Included in the work to be performed by the joint venture was the steel fabrication on the blast locks and on platform

levels 2 and 3 for the eighteen missile silos at Davis-Monthan and the five missile silos at Vandenberg (Jt.Ex. 8). This was the fabrication work actually performed by Mosher (Jt.Ex. 9 and 10).

Under the terms of the IMI-Ward second-tier subcontract Graver agreed to supply certain plate or raw steel required by IMI-Ward in performing its fabrication work, the cost of such steel to be deducted by Graver from sums becoming due the joint venture (Jt.Ex. 8). Pursuant to this provision a steel procurement procedure was established whereby IMI's Denver Steel & Iron Division manager, Sam A. Wilson, negotiated directly with the mills concerning the terms of a prospective steel purchase (R.T. 221-2, R. 1225). Once negotiations were concluded, the joint venture prepared and sent a written requisition to Graver specifying the steel supplier, the kind and grade of steel, the price, and the inspection and delivery requirements (R.T. 192, 211-12, 222). Graver in turn issued a purchase order to the steel supplier in conformity with the joint venture requisition (R.T. 905, 945-6, 573-4). Following receipt of Graver's purchase order the mill shipped the steel and billed Graver on the sale. Graver, upon making payment, charged the same against the joint venture subcontract price (R.T. 212, 221).

When Wilson or other joint venture representatives handled the preliminary negotiations, the mill representatives were advised that the ultimate purchase order would be issued by Graver (R. 1225). In no instance did an IMI or joint venture officer ever purport to issue a purchase order or to enter a contract with a steel supplier in Graver's name (R.T. 222). That purchase order commitment was made exclusively by a representative of Graver (R.T. 224-5).

Mosher Negotiations

Through this procedure substantial quantities of steel had been purchased and sent to the Denver Steel & Iron Division yards by October, 1961 for expected use in fabrication work assigned to that Division by the joint venture (R.T. 183). The Division, however, was encountering difficulty in completing fabrication in time to meet the field schedule at Davis-Monthan (R.T. 180). Joint venture manager Morton, therefore, gave Wilson the task of locating subcontractors willing to perform a part of the joint venture's fabrication work (R.T. 997).[2]

The joint venture thereafter set up a meeting on October 11, in Denver, at which time Graver "was brought into the picture" in order to secure its approval of Mosher as a prospective subcontractor (M.Ex. 39, P. 22).[3] Such approval was given by Graver's Tucson project manager, Lionel Lancaster, who agreed that the joint venture might negotiate a subcontract with Mosher covering the levels 2 and 3 and blast lock material fabrication for Davis-Monthan (R.T. 185).

On October 13, Wilson travelled to Mosher's Dallas

[2] Morton testified that, "At the time it was decided to subcontract, Sam Wilson was given the task of locating the subcontractor. He advised me that Mosher had the capacity to handle this work, that they were interested, and that he would like to go to the Mosher plant, meet with the Mosher people and see whether or not he could negotiate a satisfactory contract. I gave him permission to do so and told him to report back to me what he could do — what the terms of this agreement would be and the terms of what it would cost us to have this work done" (M.Ex. 39, p. 20), (R.T. 997).

[3] The subcontract provided that all joint venture subcontractors and suppliers were subject to approval by Graver. This provision was included because a similar contractual requirement was imposed upon Graver by Fluor and Matich-Sundt and upon those prime contractors by the Corps of Engineers (Jt.Ex. 1-4). As a result, Graver was necessarily consulted whenever the joint venture engaged a subcontractor or supplier (R.T. 506-7).

plant and met with Mosher's senior contracting engineer, Paul Mitchell, and its vice president, Ralph Burton (R.T. 61). Wilson and Mitchell were business acquaintances and the latter knew Wilson was IMI's Denver Steel & Iron Division manager (R.T. 59, 116). No Graver representative was present (R.T. 71). At the meeting the parties reviewed the proposed Davis-Monthan fabrication work and discussed terms, prices, and conditions on which Mosher would be prepared to perform the work (R.T. 66, 71). Although he had no authority to do so, Wilson also told Mitchell and Burton that a Graver purchase order would be issued to cover the material fabrication (R.T. 191).

After the meeting Mosher set up a shop order on its books showing Graver as the prospective customer (Jt.Ex. 12, R.T. 351). Mitchell also prepared and sent Wilson a letter covering Mosher's proposal for the work (M.Ex. 1, R. 1226). The second paragraph of the October 16 letter stated (M.Ex. 1):

> "It is agreed that a formal purchase order will be forthcoming from Graver Tank & Manufacturing Company to cover the fabrication of this material. In the interim it would be appreciated if you would review the conditions of this order as outlined below and return two copies of this letter signed as indicated at the bottom of the letter."

At the bottom of the letter was a provision for acceptance which, after Wilson signed it, read as follows:

> "Accepted:
> Denver Steel and Iron Works Company
> For Graver Tank and Manufacturing Company
> By *S. W. Wilson*
> Title *Division Manager*
> Dated *October 20, 1961*"

Wilson signed the foregoing letter as IMI's Division Manager without authority and without consulting his

superior Morton or any Graver representative (R.T. 223, 224).[4] The signed letter reached Mosher on October 26 (R.T. 26). Unsigned copies were sent to Graver and to the joint venture's main office at Studio City. (R.T. 214, 509, 801).

As soon as Wilson's action came to his attention, Morton objected to handling the transaction on the basis of a purchase order from Graver because it entailed a loss of profit to the venture. IMI-Ward received a greater price for steel fabrication from Graver than Mosher was to receive under the proposal negotiated by Wilson (R.T. 243). As a result, Morton took the position that, "At no time was Mosher to deal directly with Graver in the matter of this subcontract" (M.Ex. 39, p. 33). The joint venture therefore issued no requisition to Graver.

Graver's contract engineer, R. R. Branting, raised a similar objection when a copy of Wilson's letter reached Graver's office in Chicago (R.T. 509-10, 534). Unlike the situation with respect to raw steel procurement, no agreement or procedure existed for issuing Graver purchase orders on fabrication work undertaken by the joint venture (R.T. 535, U.Ex. G). Accordingly, Branting immediately wrote Graver's Tucson project manager, Lancaster, stating (U.Ex. G):

> "It was my understanding that Denver Steel was to subcontract the work which had not been handled in their own shop, not to commit Graver to pull their chestnuts from the fire."
>
> "The establishment of a plan whereby Graver

[4] Wilson testified that at the October 11 Denver meeting Lancaster had said that a purchase order would be forthcoming provided Wilson could negotiate a satisfactory deal (R.T. 234). He admitted, however, that no Graver officer in this instance or any other had authorized him to sign either a preliminary or any other type of agreement in Graver's name (R.T. 212, 224, 226).

will or will not subcontract work taken from IMI shops would appear to be advantageous. A thoroughly documented, definite understanding now may prevent some unpleasant surprises later on. To my knowledge no such understanding exists or has been initiated. Unless some procedure is established, Graver may find itself committed to two or more sources for the same items."

In response to Branting's letter Lancaster immediately wired in reply (U.Ex. M):

". . . concerning letter from Mosher Steel to Sam Wilson indicating that a final purchase order would be forthcoming from Graver Tank & Mfg. Co. to cover material fabrication. This was taken care of directly and immediately with George Morton. Mosher has received a purchase order direct from Idaho-Maryland Industries, Inc. and Graver Tank and Mfg. does not enter into it . . . ."

The October 31 Meeting at Dallas

As Lancaster's telegram indicated, Morton immediately advised Mosher that the fabrication work would not be covered by a Graver purchase order. For this purpose he sent the venture's chief contracting officer, Wallace Orr, and its Tucson construction manager, Bill Holmes, to meet with Mosher's officials in Dallas on October 31 (R.T. 791). At the meeting, at *which no Graver representative was present,* Orr and Holmes requested Mosher to accept a joint venture purchase order for the Davis-Monthan work described in Mitchell's October 16 letter and also to accept a further joint venture purchase order for about $25,000 of additional fabrication work on the Vandenberg job (R.T. 89, 742-6). *This was the first time the Vandenberg work was discussed with Mosher.*

Regarding financial capacity, Orr and Holmes pointed out to Mosher that this was not a negotiation

for IMI, but rather for the IMI-Ward joint venture, and that current Dun & Bradstreet reports showed Ward enjoyed a net worth of about $11,000,000 (R.T. 795). Orr and Holmes left the meeting with the understanding that Mosher would undertake the work on joint venture purchase orders (R.T. 796-71, 814).

On November 3, IMI-Ward's purchasing officer, Frank Wright, prepared and sent two joint venture purchase orders to Mosher pursuant to instructions from Orr (Jt.Ex. 9 and 10, R.T. 797-8). One order covered the Davis-Monthan work described in Mitchell's October 16 letter signed by Wilson (Jt.Ex. 9). The other order covered the additional Vandenberg work first discussed by Orr and Holmes at the October 31 meeting in Dallas (Jt.Ex. 10).

Graver's comptroller, John Page, learned of the Orr and Holmes meeting with Mosher through a memorandum from Graver's project expediter, Harle, which reported, "To my knowledge, at present, Denver Steel & Iron is going to place an order with Mosher, the payment of which may have to be guaranteed by Graver" (Jt.Ex. 20). Page immediately telephone IMI's comptroller and joint venture committee representative, Vernon John, in order to clarify Harle's report (R.T. 518-20). A contemporaneous memorandum of that conversation was prepared, which stated (U.Ex. K):

> "[Mr. Page] immediately called Vernon John of IMI-Ward to clarify [Harle's memorandum]. The gentlemen negotiating for IMI-Ward with Mosher was in Mr. John's office when the call went through. He assured Mr. John that Mosher was no longer requesting that Graver guarantee payment. *Mr. Page told Mr. John that he, Page, did not have authority to guarantee such payment, and that guarantee would be considered only upon the written request of Mr. John which must include an*

agreement that any payment made by Graver to Mosher would then be withheld from IMI-Ward's progress payment." (Emphasis supplied.)

Wallace Orr, IMI-Ward's contracting officer, testified (R.T. 799) that he was in John's office when this call was made.

On November 7, Graver's expediter, Harle, visited Mosher's office in Houston in order to ascertain when the first items of fabricated steel for IMI-Ward would be arriving at Davis-Monthan (R.T. 914-5, 936, 265). He was advised that the first shipment would be ready in about a week (R.T. 267). Mosher's treasurer, Mr. Moore, told Harle that shipments would be released only upon confirmation that Graver would be responsible for assuring payment (R.T. 354-5). Harle suggested to Moore that the latter telephone Graver's controller, Page, in Chicago in order to discuss Mosher's requirements. During the telephone conversation, Moore told Page that he "had agreed to accept IMI-Ward's purchase order" (R.T. 269). However, Moore went on to declare that delivery would be made only upon the understanding that "if we were not paid within the terms of the sale that they [Graver] would have to be responsible for paying Mosher Steel Company" (R.T. 355). Page informed Moore that before any consideration could be given that request Morton's approval would first have to be secured (R.T. 356).

Page-Moore Telephone Conversation of November 15

Eight days later, on November 15, Moore again called Page in connection with the same subject. The call was made after Harle's further inquiry (R.T. 267, 271, 276) concerning Mosher's first item of fabrication work now scheduled for shipment on November 15 or 16 — an item costing approximately $7,255 (R.T. 885-6).

It was this November 15 telephone conversation between Page and Moore on which the court below predicated Union's liability in this action.

With respect to the November 15 telephone conversation, Page testified that Moore was seeking Graver's guarantee of not only the November 16 shipment but in addition on all subsequent shipments which would be made under the joint venture's Davis-Monthan purchase order. Page declared that he orally agreed to guarantee payment of the item scheduled to be released the following day but advised Moore that a guaranty of the joint venture's entire Davis-Monthan order would have to be cleared with his superiors at Union (R.T. 742-8). Page stated, "As best I recall it, Mr. Moore wanted a guarantee by Graver of the payment of the shipments of material that would be made to Tucson for the account of this IMI-Ward Joint Venture. I told him I would guarantee payment right then and there over the telephone of the one shipment that was ready. And I would find out what I could do about the rest of it. This probably meant that I would think about it and talk to the higher ups in Union Tank Car and see if we could guarantee it, the whole thing" (R.T. 742, 744). Page further told Moore that as to "the rest of it I would consider and find out what I would do and write him a letter" on the matter (R.T. 759, 745, 747).

Page's account of the conversation was confirmed by a telegram sent to Mosher the same day in which Page stated (Jt.Ex. 22):

> "Please accept this wire as guaranty of Idaho-Maryland payment to you on your November 16 shipment. Complete details will follow in letter early next week."

Moore acknowledged that he received Page's telegram on November 16 but denied that the telegram

represented the substance of the telephone conversation on the preceding day (R.T. 411). Moore testified on deposition examination[5] and at trial that he understood that Mosher was to have a guaranty of the entire Davis-Monthan order (R.T. 415).

Moore stated in his deposition that during the conversation Page told him that he had received Morton's approval for an arrangement whereby Graver would pay in the event IMI-Ward failed to pay the account on time. Moore testified, "I asked him what – had he gotten approval from Morton so we could proceed with the order, that the service department wanted a release on it, and he said he had gotten approval of Morton and that they would pay us direct if we did not receive the money and withhold the money, of course, from IMI-Ward, the amount that they paid us." (U.Ex. UUUU, p. 27). When asked whether his understanding was that Union should pay only if the joint venture did not pay, Moore answered, "Yes, if we were not paid on time by the joint venture" (U.Ex. UUUU, p. 33). Summing up his testimony, counsel asked Moore if the understanding was, ". . . if the joint venture didn't pay you, that they [Graver] would be in a position to withhold money and pay you direct, is that correct?" Moore answered, "Correct" (U.Ex. UUUU, p. 35).

At the trial Moore testified on direct examination that he told Mr. Page that Mosher had to have assurance "that if we were not paid within the terms of the sale that [Graver] would be responsible" (R.T. 355). Moore declared, "I did tell Mr. Page that we were practically ready to make the first shipment on this and we had to have something definite about the payment for the fabricated material. And I asked him if he had gotten

[5] The portions of Moore's deposition to which reference is made in this brief were read into evidence pursuant to F.R.C.P. Rule 26(d).

approval from Mr. Morton for them to pay us direct and deduct it from the contract. He said that he had talked to Mr. Morton and that Mr. Morton had given him approval.[6] And he stated that he would write me a letter in a day or two, outlining this agreement by Mr. Morton for payment of this material" (R.T. 362).

Moreover, on cross-examination Moore again admitted that he told Page that his company wanted an understanding whereby "Graver would agree to pay [Mosher] *if* IMI failed to do so" (R.T. 408). He conceded that during the conversation with Page on November 15, he was "insisting that Graver pay *if IMI-Ward failed to pay* within the terms of the order" (R.T. 409), and that he "had assurance from Mr. Page that the entire account was guaranteed" (R.T. 416). Moore also reaffirmed his deposition testimony that Page had orally promised to pay but only "if we were not paid on time by the Joint Venture" (R.T. 456). Finally, with reference to the letter "outlining this agreement," Moore said that Page promised "to write me a letter in a day or two giving *final approval* on this agreement" (R.T. 301).

Moore also testified that he disregarded Page's telegram guaranteeing the first shipment because he had expected a letter guaranteeing the entire amount (T.R. 415-6). He further admitted that when discussing the proposed guaranty, *neither he nor anyone else at Mosher had talked with Page about the separate Vandenberg purchase order* first discussed with Orr and Holmes on October 31. The conversation with Page related solely to the Davis-Monthan job (R.T. 422).

Immediately after receiving Page's telegram, Moore sent a TWX to Mosher's Houston office advising his

[6] No such "approval" conversation was recalled by Page (R.T. 706) or testified to by Morton.

subordinate, "I have a wire from Mr. Page. Graver guarantee account of Idaho-Maryland. You may mark it open" (M.Ex. 4). With reference to the telegram and TWX, Moore testified (R.T. 416):

> "Q. Now, Mr. Moore, does not that TWX there mean you understood Mr. Page's telegram to be a guaranty of the entire account?"
>
> "A. I understood all the time it was supposed to be a guaranty of the entire amount."
>
> "Q. The telegram was?"
>
> "A. I had assurance from the very beginning. Yes. And I expected the entire amount to be guaranteed."

At no time prior to suit did Moore ever advise Page or any other Graver representative that the telegram incorrectly stated the substance of the November 15 conversation (R.T. 412-6). He also admitted that he never received or requested the letter of "final approval" from Page which supposedly was to guarantee the entire account (R.T. 413-416). Page had previously advised IMI that a guaranty of the account "would be considered only upon the written request" of the joint venture (R.T. 520, U.Ex. K). This "written request" did not reach Graver until December 11, 1961, at which time Page had left Graver's employe and Perry Trytten had been appointed Graver's new comptroller (R. 1231). It authorized Graver "to pay Mosher Steel invoices which will approximate $225,000 after our acceptance of the work performed by this company" (Jt.Ex. 26).

The following day, Trytten's assistant drafted a proposed letter of guaranty of the joint venture's entire account with Mosher (Jt.Ex. 21). That proposed letter, dated December 12 and addressed to Moore, read (Jt.Ex. 21):

"Reference is made to our wire of November 15, 1961, in which we extended to you our guaranty of Idaho-Maryland Industries-Ward Industries Corp. account for shipments you made on their behalf on or about November 16, 1961."

"We are now prepared to enlarge this guaranty sufficiently to cover all payments which will become due to you by IMI-Ward for items you furnish them in connection with their sub-contracts under us at Tucson, Arizona and Vandenberg, California."

Trytten submitted the proposed letter of guaranty for consideration by his superiors. They advised against enlarging Page's November 15 telegram guaranty and suggested that any further guaranty be made only on a shipment-by-shipment basis should Mosher again seek Graver's assurance of payment (Jt.Ex. 24). Trytten accordingly marked the letter "Hold" and placed it unsigned in Graver's files (M.Ex. 36, p. 364).

Invoices Covering Mosher's Work

Following receipt of the joint venture purchase orders Moore authorized Mitchell on November 16 to enter supplements on Mosher's shop order for the Davis-Monthan work for the purpose of changing the customer's name from Graver to IMI (Jt.Ex. 13, R.T. 92). At the same time he also directed Mitchell to enter an original shop order in the name of IMI covering the separate fabrication work on the Vandenberg project (M.Ex. 22-A, R.T. 100-1). Mitchell also obtained from the joint venture 100 IMI-Ward receiving reports which were used by Mosher on shipments made pursuant to the joint venture's purchase orders (Jt.Ex. 44, R.T. 102).

From that date onward, Mosher regularly invoiced the joint venture on all shipments made pursuant to IMI-Ward's November 3 purchase orders (Jt.Ex. 14). *At no time were any invoices sent to Graver* (R.T. 397-

8). In December, 1961, Wright of IMI-Ward advised Moore that Mosher's invoices were not billed by sites and levels as required by the joint venture purchase orders (R. 1235). Mosher consequently rebilled the work and sent new invoices to IMI-Ward on about January 19, 1962 (R.T. 367-381). At no time were copies of these revised invoices sent to Graver (R.T. 400-1, 397-8).

While the fabrication work was under way in its shops, Mosher also accepted numerous change orders from the joint venture increasing the dollar amount of work being done under the November 3 joint venture purchase orders (Jt.Ex. 14, U.Ex. VVV through ZZZ, R.T. 129, 136). Once again, Mosher never gave Graver notice of its acceptance of the change orders and never sent Graver any invoices thereon (R.T. 130, 424).

While Mosher was performing this material fabrication work for IMI-Ward, the joint venture regularly invoiced Graver on a percentage of completion basis for the work covered by its second-tier subcontract (R.T. 520-1, 550-6, U.Ex. CCCC). The invoices covered the items under Section 4 of the subcontract (U.Ex. IIII, JJJJ, R.T. 594) which included the blast lock and levels 2 and 3 fabrication work performed by Mosher (R.T. 555, U.Ex. T-Y). The joint venture assigned its invoices, including those covering work under Section 4 of the subcontract, to the United California Bank in order to secure advances from the bank under previously negotiated credit arrangements (R. 1235, R.T. 593). The bank presented these invoices to Graver and received payment thereon (U.Ex. IIII).

IMI Bankruptcy

By February 2, 1962, payments on IMI-Ward in-

voices and credits for Graver-supplied material had already exceeded the amount due under the progress payment schedule for joint venture work. As of that date Graver had made payments exclusive of material purchases, totaling $2,359,966 against available items of work totaling $2,285,182, evidencing an overpayment to the joint venture in the amount of $74,784 (U.Ex. VV, XX, PPPP, R.T. 622). On that date IMI defaulted in performance of the joint venture subcontract work and filed a voluntary petition in bankruptcy under Chapter XI of the Bankruptcy Act in the United States District Court for the Southern District of California, Central Division (R. 1235).

Because of the bankruptcy and IMI's inability as a joint venturer to proceed with the subcontract work, Graver was obliged to negotiate new arrangements with the IMI-Ward representatives. These arrangements were embodied in two agreements dated February 1 and 5, 1962, which were executed by the three companies concerned (U.Ex. N, M.Ex. 23).

Under the February 1 agreement the IMI representatives relinquished their joint venture management rights to their co-venturer, Ward, which, in turn, assumed the primary responsibility for completing the joint venture subcontract work. Ward then appointed Union as manager for the purpose of completing the subcontract work on behalf of the joint venture. The February 1 agreement expressly provided "that the moneys required to perform the contract described in the joint venture agreement is to be the obligation of Ward Industries Corporation and IMI" (U.Ex. N).

The February 5, 1962 agreement further defined the obligations of the parties under the new management arrangement. It provided that Union would (M.Ex. 23):

"C. Purchase the inventory and work in process, both at the Tucson plant or at the premises of any subcontractors, and to pay for same, if Union has not already done so. The price shall be replacement cost."

"E. All money so paid shall be charged to the Joint Venture account."

"F. If an agreement cannot be reached concerning any price, the parties agree to submit to the jurisdiction of the Bankruptcy Court for the purpose of having such amount determined."

The February 1 and 5 agreements were approved by order of the Bankruptcy Court (M.Ex. 23), and constituted the contracts pursuant to which Graver served as manager in completing the joint venture subcontract work on behalf of IMI-Ward. The contracts were matters of record in the Bankruptcy Court. Subsequent to February 2, 1962, Mosher shipped an additional $55,000 of fabricated steel pursuant to the joint venture's November 3 purchase orders (R.T. 394).

Bankruptcy Claims

On August 9, 1962, Mosher filed its claim in the Los Angeles Bankruptcy Court. The claim stated that IMI was indebted to Mosher in the amount of $321,000 by reason of the fabrication of steel for IMI pursuant to the purchase orders issued by that company on November 3, 1961. Of this sum $55,253 covered fabricated steel delivered after February 2, which sum Mosher claimed as an administrative charge against the debtor (U.Ex. D). A statement of account and supporting invoices were attached to Mosher's proof of claim and disclosed that all items of work had been billed to IMI

(U.Ex. D).[7] The claim further stated that Mosher was asserting its demand against IMI without prejudice to its rights against Ward and Graver (U.Ex. D).

On December 31, 1962 the Referee in Bankruptcy, pursuant to a plan of arrangement, ordered issued to Mosher as a general unsecured creditor in payment of its claim 642,107 shares of IMI stock (U.Ex. E). IMI thereafter changed its name to Allied Equities Corporation and the stock was actually issued in a 1 to 20 "reverse split" whereby Mosher received 32,105 shares of Allied Equities Corporation stock (R. 1237). The value of this stock was established by stipulation of the parties to this action at $1.625 per share or a total of $52,170.62 (R. 1237).

Institution of Suit

On June 10, 1962, Messrs. Moore and Mosher came to Chicago to discuss Mosher's unpaid invoices with Union's executive vice president, Van Gorkom. Moore and Mosher took the position that Union's Graver Division had orally guaranteed their payment (R.T. 867). No claim was made that Graver was liable as a principal for payment for the fabrication work (R.T. 396-7, 868). After reviewing Graver's records and conferring with members in his organization Van Gorkom advised Mosher and Moore that he could find no evidence of a guaranty, either oral or written, beyond the first shipment covered by Page's November 15 telegram (R.T. 869, 870, 872). Six months later, on January 23,

[7] During the course of the bankruptcy proceedings IMI also sued Union to recover $300,000 as money due and owing the debtor under the terms of the February 5 agreement. IMI's claim included $55,253 for fabricated material on levels 2 and 3 which was delivered by Mosher to the Debtor after February 2 and subsequently released to Graver as Manager for the Joint Venture (U.Ex. PPP).

1963 Mosher instituted this action against Ward, Union, and Fluor and its sureties (R. 1680).

Plaintiff's amended complaint (R. 268-80) against Union alleged four alternative theories of recovery: (1) that Union had requested Mosher to perform the subject work for the joint venture and had agreed to pay for the same on completion thereof (Counts II and IV, R. 271, 275); (2) that Union had orally promised to guarantee the account of IMI-Ward with the intention of not honoring its promise in order to induce Mosher to accept purchase orders from the joint venture Count V, R. 275); (3) that Union and IMI-Ward had entered into a third party beneficiary agreement for the benefit of Mosher whereby Union agreed to pay Mosher and IMI-Ward agreed that such payment would be deducted from funds coming due to the joint venture (Count VI, R. 277); and (4) that under the February 5 agreement approved by the bankruptcy court Union undertook to pay Mosher for fabricated steel deliveries made after IMI's institution of bankruptcy proceedings on February 2, 1962 (Count VII, R. 278).

Union's answer to the amended complaint denied that any of the alleged agreements or promises had been made or given and denied that the February 5 agreement approved by the bankruptcy court conferred any right upon the plaintiff (R. 1095). As further defenses Union pleaded (1) that any alleged guaranty contract was invalid by reason of the statute of frauds (R. 1099); (2) that any alleged third party beneficiary contract was rendered unenforceable because of the joint venture's default and for want of funds due the joint venture out of which to pay plaintiff (R. 1101-2); and (3) that plaintiff was estopped to assert a claim against Union by reason of having elected in the bankruptcy court to treat the indebtedness in question as the primary and indi-

vidual responsibility of IMI (R. 1098-9).

Union also filed a counterclaim against plaintiff which prayed that the court determine whether a principal-surety relationship existed between Ward and Union with respect to the Mosher claim, and in the event such relationship was found to exist and Union and Ward were each held liable to Mosher, that plaintiff be compelled first to seek satisfaction of its claim from Ward as the defendant primarily responsible for payment (R. 295).

Findings and Conclusions of the Court Below

On May 24, 1966 the court below entered findings of fact and conclusions of law holding all defendants liable to Mosher (R. 1220-40). With respect to Ward the court held that the defendant "as a member of the IMI-Ward, is obligated to Mosher by reason of Mosher's performance of the terms and provisions on Mosher's part contained" in the November 3 purchase orders (R. 1238). It further held that there was due Mosher $298,336.58 for fabrication work on the Davis-Monthan job and $22,716.96 for fabrication work on the Vandenberg job. Crediting $52,170.62 for the IMI bankruptcy distribution to Mosher, the court directed the entry of judgment against Ward in the amount of $268,882.92 (R. 1241).

With respect to Union the court rejected plaintiff's proposed findings that the October 16 letter signed by IMI's Division Manager Wilson constituted a contract between Union and Mosher, and further rejected plaintiff's proposed findings and conclusions that Union either had authorized Wilson to execute such a writing or had ratified his action (R. 1406). The court also refrained from holding that the February 5 agreement approved by the bankruptcy court conferred on Mosher any right or claim against Union.

However, the court did conclude that Page's telephone conversation with Moore on November 15, 1961 "constituted a contract and had the legal result of obligating Union to pay Mosher for all sums becoming due to Mosher" under the terms of the November 3 purchase orders issued by IMI on behalf of the joint venture (R. 1238). The court also held that the sending of a letter of final approval of the alleged November 15 oral agreement was not a "condition precedent" to consummation of a contract but that if it were, Union was "estopped to raise the non-performance of the condition as a defense" (R. 1238-9). It further concluded that the alleged oral agreement of November 15 was not unenforceable by reason of the statute of frauds (R. 1239).

In connection with Union's agreement to pay Mosher directly, the court also held that Union and IMI-Ward "agreed that Union might pay Mosher for its work, after acceptance of the work by the joint venture, and deduct Mosher's invoices from the contract price between Union and IMI-Ward" (R. 1239). The existence of any indebtedness from Union to IMI-Ward against which Union might charge what it paid to Mosher under this alleged agreement was deemed by the court not to constitute "a condition precedent to its obligation to pay Mosher" (R. 1239). The court thereupon entered judgment against Union in an amount identical to that entered against Ward (R. 1241).

With respect to Fluor and its sureties, the court held that these defendants were liable to Mosher under payment bond executed in connection with the Davis-Monthan job because of a "direct" contractual relationship which the court found to exist between Union and Mosher (R. 1237). It entered judgment against Fluor and its sureties in the sum of $246,165.96 as the unpaid

balance for work performed at Davis-Monthan (R. 1237, 1239). The judgment did not cover the Vandenberg work because Matich-Sundt was the prime contractor on that job (R. 1241, Jt.Ex. 4).

Finally, the court concluded that Mosher was not barred or estopped from recovery from any of the defendants "by reason of its prosecution of its claim in the proceedings in the matter of the bankruptcy of IMI and its acceptance of the stock issued to it on its claim" (R. 1237).

"On June 20, 1966 the court entered a second judgment denying Union's counterclaim (R. 1345). No findings or conclusions were entered with respect to the counterclaim and no reasons were assigned for the court's action.

SPECIFICATION OF ERRORS

1. The court below erred in entering Findings of Fact No. 35 and No. 39 insofar as they find as follows:

> "35. On November 15, 1961, Moore telephoned Page in Chicago and Page informed him that a clearance had been obtained from Morton for Graver's paying Mosher directly and informed Moore that Graver would make payment to Mosher directly, with deduction being made from the IMI-Ward contract. Page advised Moore, also, that he would write Moore a letter to this effect (R.T. 360-362)."

> "39. * * * By reason of Moore's telephone conversation with Page on November 15, 1961, and the telegram from Page of that date, Moore understood and had reason to understand that Graver would pay Mosher directly for all the work described in Jt. Exs. 9 and 10 in evidence."

The challenged findings are unsupported by any sub-

stantial evidence, are contrary to undisputed and documentary evidence, and constitute in substantial part statements of erroneous legal conclusions rather than findings of fact.

2. The court below erred in concluding that Page's telephone conversation with Moore on November 15, 1961, and his telegram to Moore of the same date, together with Mosher's resulting action on November 16, 1961, and subsequently, with relation to the November 3 purchase orders, constituted a "direct contract" and had the legal result of obligating Union to pay Mosher directly for all sums coming due to Mosher under the terms and provisions of the November 3 purchase orders with respect to the Davis-Monthan and Vandenberg jobs.

3. The court below erred in concluding that the sending to Mosher of the letter of "final approval" allegedly discussed in the telephone conversation between Moore and Page on November 15 was not a condition precedent to the creation of a contract between the parties and that such alleged contract was not required to be in writing under the Statute of Frauds.

4. The court below erred in concluding that if the aforementioned letter was a condition precedent to Union's alleged agreement or obligation to pay Mosher then Union was estopped to raise the non-performance of the condition as a defense.

5. The court below erred in concluding that Union and IMI-Ward agreed that Union might pay Mosher for its work after acceptance of the work by IMI-Ward and deduct Mosher's invoices from the contract price between Union and IMI-Ward and that neither IMI-Ward's performance of the contract work nor the existence of an indebtedness from Union to IMI-Ward against which Union might charge payments was a

condition precedent to the alleged obligation to pay Mosher.

6. The court below erred in concluding that Mosher was not barred or estopped from recovering from Union by reason of the prosecution of its bankruptcy claim against IMI and the acceptance of the stock issued on said claim to Mosher as a general creditor of IMI.

7. The court below erred in denying Union's counterclaim and in refusing to grant the relief prayed for thereunder, and in failing to enter findings of fact and conclusions of law supporting its judgment denying the counterclaim.

ARGUMENT

POINT I.

THE COURT ERRED IN HOLDING THAT THE NOVEMBER 15 TELEPHONE CONVERSATION RESULTED IN AN ORAL CONTRACT OBLIGATING UNION TO PAY MOSHER FOR WORK PERFORMED FOR THE JOINT VENTURE

(Specifications of Error Nos. 1, 2, 3 and 4)

SUMMARY OF ARGUMENT

The court erred in holding that the November 15 Page-Moore telephone conversation resulted in an oral contract whereby Union became obligated to pay Mosher for all work performed for IMI-Ward at both Davis-Monthan and Vandenberg. Page's oral promise, which he confirmed by telegram, was limited to a guaranty of the first $7,600 material shipment for Davis-Monthan. Moore conceded that the joint venture's separate Vandenberg order was not even discussed during the November 15 telephone conversation. The District Court's contrary findings based on Moore's testimony were

clearly erroneous. Moore's testimony as a matter of law established no enforceable oral contract. He testified that Page promised "to write me a letter in a day or two giving final approval on this agreement." He testified further that by "this agreement" he meant Page's alleged promise that Union would pay for the Davis-Monthan work "if the joint venture didn't pay." This testimony proved no contract because "final approval" was never given. Moreover, any such oral guaranty would be unenforcible under the statute of frauds as a promise to answer for the debt, default or miscarriage of another person. Nor was Union estopped from contending that a "final approval" letter constituted a condition precedent to the creation of an enforcible guaranty. Estoppel is inapplicable to an oral agreement barred by the statute of frauds or an oral promise to reduce a guaranty to writing.

The $268,882 judgment entered against Union by the court below rests on the court's holding that the November 15, 1961 Page-Moore telephone conversation gave rise to an oral contract whereby Union unconditionally agreed to pay Mosher for all steel furnished, fabricated and delivered to Davis-Monthan and Vandenberg pursuant to IMI-Ward's November 3 purchase orders.[8] In arriving at this decision the court below necessarily had first to establish as a matter of fact what was said by Page and Moore during their telephone

[8] This holding was stated in the form of a fact finding in Findings 35 and 39 (see Specification of Error No 1, *supra*, p. 24), and was reiterated as a legal conclusion in Conclusion 6, as follows: "Page's telephone conversation with Moore on November 15, 1961, and his telegram to Moore of the same date, together with Moore's resulting action on November 16, 1961, and, subsequently, with relation to Jt. Exs. 9 and 10 in evidence [joint venture November 3 purchase orders], constituted a contract and had the legal result of obligating Union to pay Mosher directly for all sums becoming due to Mosher under the terms and provisions of Jt. Exs. 9 and 10 for furnishing, fabricating and delivering steel to the Tucson and Vandenberg jobs" (R. 1238).

conversation on November 15 and, upon establishing that fact, had then to determine as a matter of law what obligation, if any, was thereby created. We submit that the court below erred both in performing its fact finding function and in applying the law applicable to this case.

A. THE COURT'S FINDING OF FACT WITH RESPECT TO THE NOVEMBER 15 TELEPHONE CONVERSATION IS CLEARLY ERRONEOUS.

The testimony given by Page and Moore concerning the crucial November 15 telephone conversation in reality conflicted in only one substantial respect. Page testified that while Moore was requesting a guaranty of payment on all work covered by the joint venture's Tucson purchase order, he only committed Graver to an immediate guaranty of the scheduled November 16 shipment which Harle was seeking to have released from Mosher's shop (R.T. 742). As to the balance of the order, Page informed Moore that the matter would have to be considered by his superiors and that he would report to Moore by letter (R. 745, 747, 749). Moore, on the other hand, denied that the promised guaranty had been limited to the first shipment confirmed by Page's telegram and with respect to which Graver's expediter Harle was seeking a release. He asserted that Page had promised to send a letter giving final approval to a guaranty covering payment of all Davis-Monthan fabrication work included in the November 3 purchase order (R.T. 415-6).

In evaluating this conflicting testimony, it must be remembered that Page left Graver in December, 1961 and had not been in its employ for three years prior to the time of trial (R. 1234). He had no position or relationship with Graver to protect when testifying in this

case. Moore, however, continued as Mosher's treasurer and general credit manager at the time of trial (R.T. 350). His employer's claim for relief against Union obviously depended upon his testimony and the words he was prepared to attribute to Page during that brief telephone conversation three years before the trial.

The court below nevertheless disregarded Page's testimony and credited Moore's version of the scope of the proposal although Moore was the one witness who more than any other might be expected to offer a biased and partisan recollection. Moreover, the trial court accepted Moore's version of the telephone conversation in the face of contemporaneous documentary proof and other undisputed evidence consistent only with the testimony given by Page.

Branting's November 2 memorandum confirmed that Page had told John of IMI-Ward two weeks before his conversation with Moore that, "He, Page, did not have authority to guarantee payment of the venture's Tucson order" and that a guaranty "would be considered only upon the written request" of the joint venture (U.Ex. K). Therefore Page's testimony that he told Moore on November 15 that he would have to discuss any guaranty beyond the first shipment with his "higher-ups" was fully corroborated by the previously expressed and recorded view of his authority. It is undisputed, moreover, that the written request which Page considered a condition precedent to "consideration" of a guaranty was not received by Page at the time of the November 15 conversation and in fact was not received until December 11, when Page was no longer a Graver employee (R. 1231). Yet the court below concluded that Page on his own authority voluntarily agreed to extend a guaranty of the entire order without this written request in hand. Again, when the joint venture's authorization

was received in December, it was by its terms limited to work involving a dollar amount of "approximately $225,000" (Jt.Ex. 26). The court below nevertheless concluded that Page was willing orally to make an open-end commitment on behalf of his company to be responsible for payment of everything Mosher shipped to the joint venture — an amount eventually exceeding $320,000, or nearly $100,000 more than the sum covered in the joint venture's belated authorization letter.

Even more important than these facts is the language of Page's November 15 telegram to Moore which exactly confirmed Page's version of the telephone conversation. It states, "Please accept this telegram as guaranty of Idaho-Maryland's payment to you on your November 16 shipment. Complete details will follow in a letter early next week" (Jt.Ex. 22). Page obviously was prepared to guarantee a $7,600 initial shipment in summary fashion on his own authority. A guaranty of several hundred thousand dollars, however, was a problem of substantially different magnitude which required discussion with his superiors and a further report to Moore by letter. Significantly, *Moore never requested the letter of guaranty allegedly promised by Page and never disputed that Page's telegram stated the substance of their conversation until after the joint venture's default in payment.*

The fact that no guaranty beyond the initial shipment was extended on November 15 was further corroborated by a draft of a proposed extension of that guaranty prepared after the joint venture's request was received by Graver on December 12. That draft, prepared by Page's successor, Trytten, referred to the wire guaranteeing the November 16 shipment and declared (Jt.Ex. 21):

"We are now prepared to *enlarge* this guaranty

sufficiently to cover all payments which may become due to you by IMI-Ward . . ."

This draft letter of guaranty, although never signed or sent, reflected the contemporaneous understanding of Graver's officers that the existing commitment was limited to the first shipment and that enlargement of the guaranty remained an open question. Inasmuch as it was prepared for private circulation and consideration by Graver's officers, the letter had "the highest validity as evidence of intention," *United States v. General Electric Co.*, 82 F. Supp. 753, 844 (D.C. N.J., 1949). Had a guaranty been extended on November 15 as testified to by Moore, the draft letter obviously would have been drawn in terms of *confirmation* of an existing guaranty rather than an *enlargement* to cover all payments.

Finally, the conclusion of the court below with respect to the alleged financial commitment made on November 15, extended that commitment not only to material shipments for Davis-Monthan but also to the separate shipments for Vandenberg covered by a separate joint venture purchase order. No testimony or evidence was ever introduced during the trial of the case below which in any way indicated that the Vandenberg work was ever discussed between Page and Moore on November 15 or any other date. With respect to the conversation with Page, Moore actually testified that no mention was made of the Vandenberg job. He was questioned as follows (R.T. 422):

> "Q. You hadn't told Mr. Page, had you, that these two IMI or this Holmes and Orr that they had come and your company had agreed to furnish another $22,000 worth, you hadn't told him that, had you?"
>
> "A. No, I didn't tell him that."

"Q. Nobody else in your company did because you were the only one that talked to him, isn't that right?"

"A. That is right."

Yet the court below simply proceeded to lump this additional $22,700 of liability under the alleged agreement of November 15 without any basis in the record.

The Supreme Court has declared that despite the advantage which the trial judge enjoys in evaluating testimony, findings of fact nevertheless must be set aside under Rule 52(a) when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). In *Gypsum,* as in the present case, the trial court had chosen to believe oral testimony which could not be reconciled with the documentary evidence. The Supreme Court set aside the findings and declared, "Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the creditability of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly enrroneous" (333 U.S. at p. 396).

See also *Orvis v. Higgins,* 180 F.2d 537, 539 (C.A.2, 1950), where the Second Circuit held that when "the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful . . . ." Compare *United States v. Fay,* 353 F.2d 56, 59 (C.A. 2,

1965); *Fritz v. Jarecki,* 189 F.2d 445, 448 (C.A.7, 1951).

In the present case the district court's action in predicating findings on an uncritical acceptance of Moore's self-serving testimony, wholly inconsistent as it was with both documentary and other undisputed evidence, compels the conclusion that "a mistake has been committed" which this Court should correct. And, of course, where *no evidence* of any kind exists to support a finding, as here in connection with the Vandenberg work, then such finding of necessity must be set aside. *Ecko Products Co. v. Chicago Metallic Mfg. Co.,* 321 F.2d 550, 552 (C.A.7, 1963), cert. den. 375 U.S. 970.

B. MOORE'S TESTIMONY AS A MATTER OF LAW FAILS TO SUPPORT THE CONCLUSION THAT THE NOVEMBER 15 CONVERSATION RESULTED IN AN ENFORCIBLE ORAL CONTRACT.

Even if this Court should determine that the court below was empowered to enter a finding based on Moore's version of the November 15 conversation, we submit that the trial court failed to reach a proper conclusion as to the legal effect of that conversation. In other words, treating the statements attributed to Page by Moore as true and an undisputed fact, the court below was obliged to determine correctly whether those statements gave rise to a legally enforceable obligation. This determination involves the straightforward question of law with respect to which this Court has unfettered power of review.

See *Cordovan Associates, Inc. v. Dayton Rubber Company,* 290 F.2d 858 (C.A.6, 1961), where Judge Weick declared at p. 859-860:

> "When it comes to conclusions of law and inferences to be drawn therefrom, the appellate court is free to act independently and draw its own legal conclusions and inferences. *United States v. Mis-*

sissippi Valley Generating Company, 364 U.S. 520, 526, 81 S. Ct. 294, 5 L. Ed. 2d 268. If this were not so, the appellate court would be stripped of its power of review. Moreover, not all findings labeled as findings of fact are binding on an appellate court. Where a finding designated as a finding of fact is not in reality a finding of fact, but is a conclusion of law or a mixed finding of fact and conclusion of law, it is not binding on the appellate court. *Bogardus v. Commissioner,* 302 U.S. 34, 58 S. Ct. 61, 82 L. Ed 32; *Weible v. United States,* 9 Cir., 1957, 244 F.2d 158; *Chandler v. United States,* 7 Cir., 1955, 226 F.2d 403. Where a finding is of an ultimate fact in the making of which is involved the application of legal principles, it is subject to review. *Baumgartner v. United States,* 322 U.S. 665, 64 S. Ct. 1240, 88 L. Ed. 1525."

In *Plomb Tool Co. v. Sanger,* 193 F.2d 260 (C.A. 9, 1951), this Court held that in determining whether an agreement gave rise to an independent contractor status, it was not bound by the determination of the court below in its findings of fact and conclusions of law. The agreement being undisputed, the legal consequences flowing from that document were within the province of this Court to determine. It stated, at p. 264:

> "Nor is Rule 52(a), Federal Rules Civil Procedure, 28 U.S.C.A., applicable to appellant's contention that Sanger was an independent contractor, for it is not the findings of the district court that appellant assails, but rather its *conclusion* drawn therefrom. We have long recognized the advantages enjoyed by the trial judge in evaluating testimony and arriving at the facts flowing from that court's opportunity to observe the witnesses, but here the facts are not in dispute. It is rather the conclusion of the district court with which we have parted company."

Similarly, in *Stevenot v. Norberg,* 210 F.2d 615 (C.A.9, 1954), this Court stated, at p. 619:

> "When a finding is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings should not be set aside, unless clearly erroneous, but is free to draw its own conclusions."

Compare *Phoenix Title & Trust Co. v. Stewart,* 337 F.2d 978, 985 (C.A.9, 1964); *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.,* 178 F.2d 541, 548 (C.A.9, 1949).

Treating Moore's version of the crucial conversation as if it had been true and undisputed, it is nevertheless apparent from his testimony that what was discussed was not a "direct" contract but a guaranty or agreement to pay in the event the joint venture failed or refused to pay, which agreement was not to be deemed operative unless and until given "final approval" in writing. Thus Moore testified: "I told Mr. Page we would have to have assurance, that *if we were not paid within the terms of the sale* that they would be responsible for paying Mosher Steel Company" (R.T. 335). He admitted the understanding was that Graver would be obligated only "*if we were not paid on time by the joint venture*" (R.T. 456). In summing up his testimony, he acknowledged that the "correct" understanding of the arrangement was "*if the joint venture didn't pay,* that they [Graver] would be in a position to pay [Mosher] direct . . ." (U.Ex. UUU, p. 35). Time and again during the trial Moore referred to Page's alleged promise as a guaranty, stating, for example, "I understood all the time it was supposed to be a guaranty of the entire account," and "I expected the entire amount to be guaranteed" (R.T. 415, 416). Moore was no unsophisticated businessman. He was Mosher's treasurer and general credit manager. When he said "guaranty," he knew what he was talking about.

Moreover, Moore expressly conceded that the guaranty supposedly promised by Page was not a final and binding commitment at the time of the November 15 telephone conversation, but was to be made final and binding only through subsequent letter "outlining this agreement" (R.T. 362). In this regard, Moore testified (R.T. 361), "He [Page] said that he would write me a letter in a day or two giving *final approval* on this agreement." Therefore, even according to Moore, a letter of "final approval" was a condition precedent to the creation of a contract of guaranty. It is also a prerequisite under the statute of frauds.

(1) No Contract Resulted For Want of "Final Approval"

It is fundamental contract law that an enforceable bargain is not made so long as parties concerned contemplate that something remains to be done before establishing a contractual relationship between them. Preliminary negotiations may establish the salient terms of an agreement. But where execution of a writing is intended to be a condition to final agreement, such negotiations cannot be construed as a contract.

With respect to such legally inoperative preliminary negotiations it is stated in 1 *Corbin On Contracts* (1950 Ed.), § 30, at pp. 97 and 98:

> "One of the most common illustrations of preliminary negotiation that is totally inoperative is one where the parties consider the details of a proposed agreement, perhaps settling them one by one, with the understanding during this process that the agreement is to be embodied in a formal written document and that neither party is to be bound until he executes this document. . . ."
>
> * * *
>
> "The courts are quite agreed upon general principles. The parties have power to contract as they please. They can bind themselves orally or by informal letters or telegrams if they like. On

the other hand, they can maintain complete immunity from all obligation, even though they have expressed agreement orally or informally upon every detail of a complex transaction. The matter is merely one of expressed intention."

In the present case the evidence clearly discloses an "expressed intention" that the guaranty discussed orally on November 15 was not to become an enforceable contract until approved in writing. Moore expressly admitted that "final approval on this agreement" was to be given in an anticipated letter from Page. In fact, Moore's testimony in this regard corroborated rather than conflicted with that of Page, who declared that a guaranty beyond the first shipment had first to be discussed with his "higher-ups" at Union and that "complete details" would be sent "in a letter early next week." Therefore, under either version it is undisputed that the conversation involved no more than an expression of intention to extend a guaranty in writing at a future date. This created no present oral contract between the parties.

In *Merritt-Chapman & Scott Corp. v. Gunderson Bros. Eng. Corp.*, 305 F.2d 659 (C.A.9, 1962), this Court considered an almost identical question. There the district court had permitted the jury to determine whether a conversation, concerning a "promised" purchase order, of itself created an enforceable contract between the parties where the purchase order was never sent. In holding that judgment notwithstanding the verdict should have been granted for the defendant, this Court stated, at page 664:

"Gunderson further contends that certain conversations relating to a 'promised' purchase order and letter of intent constituted acceptance of its bid. No such documents were ever forthcoming. A promise to contract, or a promise to place an

order in the future, is certainly nothing more than negotiation. * * * Of the proposed purchase order and letter of intent, we can say that conversations in reference thereto indicated, at best, nothing more than an intention on the part of MCS to contract with Gunderson at some future date."

In the *Merritt-Chapman* case evidence was also presented that the plaintiff "understood" from his conversation with the defendant that the plaintiff had been granted the purchase order under consideration. Similarly in the present case the district court found that Moore "understood" from the November 15 conversation and ensuing telegram that Union would be responsible for assuring payment (R. 1232). However, this Court declared that a conversation gains no greater legal import by reason of what one of the parties "understood" as to its significance. On this issue, this Court stated, at pp. 663-664:

> "Also, what Gunderson 'understood' from the conversation can have no greater legal insignificance than that which is revealed by the actual transactions between the parties. The conversation of March 26, 1956, must be viewed in its entirety and the only inference possible is that the parties were still bargaining."
>
> * * *
>
> "MCS certainly manifested an intention to enter into a contract with Gunderson at some time in the future, and MCS may very well have taken advantage of Gunderson, but contract with Gunderson it did not."

The principles which this Court applied in *Merritt-Chapman* were also followed in *Watson v. Lehigh Valley Wood Work Corp.*, 198 F. Supp. 273 (E.D. Pa., 1961). In that remarkably similar action the defendant, during a telephone conversation with the plaintiff, allegedly promised to forward a letter of guaranty cover-

ing future credit sales of lumber to a milling company. No such letter was mailed, but subsequently a telegram was sent by defendant guaranteeing certain particular invoices totaling $16,000. During the period involved, however, the plaintiff shipped the milling company 19 cars of lumber for a total price of $68,500. On failing to receive payment plaintiff sued on the alleged guaranty.

In considering the effect of the telephone conversation, the court found as a matter of fact that defendant had orally promised to forward a guaranty letter on the account. However, it concluded that the promise was not to take effect until the letter was sent and that the telephone conversation could not of itself be considered a contract. The Court stated, at page 276:

> "Where an intention is manifested in any way, that legal obligations between parties shall be deferred until a writing is executed, preliminary negotiations and agreements do not constitute a contract. [Citations.] Therefore, Schmerling's preliminary agreement to mail a letter of guaranty did not create a binding obligation. . . . It should also be noted that § 185 of the *Restatement of Contracts* provides that a promise to sign a written contract of guaranty must be in writing to satisfy the Statute of Frauds."

The court held for the defendant commenting that when a plaintiff: "seeks to make one liable for the debt of another, the case must be clearly proved and every ambiguity in the evidence weighed in favor of the defendant" (p. 277).

See also *Neff v. World Publishing Company,* 349 F.2d 235, 248 (C.A.8, 1965); *A. E. Staley Mfg. Co. v. Northern Cooperatives,* 168 F.2d 892, 895 (C.A.8, 1948).

The state substantive law applied in *Merritt-Chapman* and *Watson* is no different than the law of Illinois

applicable in this case.[9] For its most recent expression see *Calo, Inc. v. AMF Pinspotters, Inc.*, 31 Ill. App. 2d 2, 8-9, 176 N.E. 2d 1, 5 (1961) ("Where the parties make the reduction of the agreement to writing and its signature by them a condition precedent to its completion, it will not be a contract until this is done. *Hausman Steel Co. v. N. P. Severin Co.*, 316 Ill. App. 585, 589, 45 N.E. 2d 552, 554; *Baltimore & Ohio Southwestern R. Co. v. People ex rel Allen*, 195 Ill. 423, 427, 63 N.E. 262, 263.")

These authorities illustrate the error committed by the court below in creating an enforceable obligation out of a conversation which contemplated but did not give rise to a contract. Even according to Mosher's own witness, "final approval" of the alleged guaranty was never given, and the "details" of the proposed contract of guaranty were never established by letter as contemplated by the parties. The court below simply supplied these "details" without benefit of evidence, as in the case of the Vandenberg work with respect to which even Moore admitted no discussion ever occurred. The trial court similarly supplied "details" of a non-existent November 15 bargain when it found that Union had promised to pay for $320,000 of work where the joint venture letter

[9] See *Watson v. Lehigh Valley Wood Work Corp.*, 198 F. Supp. 273 (E.D., Pa., 1961), where the question of applicable law arose under facts identical with this case, the court holding at p. 275: "It is well settled that the validity of a contract is determined by the law of the state in which it is executed. [Citations.] Watson alleges that Schmerling agreed to guarantee payment by Lehigh in a telephone conversation originating with Watson in Nevada and placed with Schmerling in Pennsylvania. Where an acceptance is to be given by telephone, the place of contracting is where the acceptor, or, in this instance, the alleged acceptor [Schmerling], speaks his acceptance. *Restatement, Conflict of Laws*, § 326 Comment (c)." See also 1 *Corbin on Contracts* (1950 Ed.), § 79, where it is stated: "The question before the courts has been as to the place at which the contract should be regarded as having been made. This has been held to be the place at which the offeree speaks the words of acceptance into the telephone transmitter."

of guaranty authorization received on December 12 authorized a deduction of $225,000 in the event a guaranty were given and had to be honored at some future date.

In *Joseph v. Donover Corp.*, 261 F.2d 812 (C.A.9, 1958), it was emphasized that courts do not create but only enforce contracts made by private parties. This Court adopted as its own, the statement that (p. 820):

> "To create a contract, then, the minds of the parties must meet as to every essential term of the proposed contract, and there must be a clear and unequivocal acceptance of a certain and definite offer in order that a mere agreement may become a contract. Therefore, it is necessary, among other things, that the minds of the parties meet as to the essential terms of the proposed contract."

In the present case the court below lost sight of this sound principle in creating an agreement where there was no meeting of the minds but only a discussion of a proposed contract never made final in the manner contemplated by the parties.

(2) The Alleged Guaranty Was Required To Be In Writing Under the Statute of Frauds

Final written approval of the proposed guaranty was not only contemplated by the parties as a condition precedent to the creation of a contract, but was affirmatively required under the statute of frauds — a defense raised in Union's answer and erroneously rejected by the court below (R. 1099). This once again involves a question of Illinois law because the authorities established that the statute of frauds of the place of contracting applies, at least where the statute is considered sub-

stantive in nature.[10]

Like the statute of frauds in most jurisdictions, the Illinois statute, *Illinois Revised Statutes* (1965), Ch. 59, § 1, provides that:

> "No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, . . . unless the promise or agreement upon which such action shall be brought, or some memorandum or not thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

In determining whether an agreement constitutes "a promise to answer for the debt, default or miscarriage of another person" within the meaning of the statute, the test generally recognized is whether the promisor by his promise is in effect a surety and is therefore secondarily liable, or whether he has accepted primary responsibility for the payment of goods or services rendered or to be performed for another.

Under this test if the oral promise creates a relationship of surety and principal between the promisor and the original debtor it is held to be within the statute and therefore unenforceable. However, an oral promise creating primary responsibility in the promisor to the creditor is not within the statute and is, therefore, enforceable if such a promise can be proved. Professor Williston states that, "The test which it is submitted is the accurate one . . . is whether a promisor is, to the

[10] See *Smith v. Onyx Oil & Chemical Co.*, 218 F.2d 104 (C.A.3, 1955); *Continental Collieries v. Shober*, 130 F.2d 631 (C.A. 3, 1942); *Schoettle v. Sarkes Tarzian, Inc.*, 191 F. Supp. 768 (E.D., Pa., 1961); *Restatement, Conflict of Laws* § 334, Comment (b). The Illinois statute of frauds has been construed as substantive in *Miller v. Wilson*, 146 Ill. 523, 529, 34 N.E. 1111, 1113 (1893) and *Murdock v. Calgary Colonization Co.*, 193 Ill. App. 295, 298-9 (1915).

actual or presumed knowledge of the creditor, a surety; if so, his promise is within the Statute." 3 *Williston, Contracts* (3d Ed., 1960) § 462, at p. 395. Professor Corbin agrees with this test. He states, "Wherever the relation between the two obligors is that of principal and surety and this fact is known to the creditor, the case is within the statute. Supposed distinctions between a 'surety' and a 'guarantor' are not material in this connection." 2 *Corbin on Contracts* (1950 Ed.), § 358, at p. 247.

The Illinois courts have regularly applied the test approved by Professors Williston and Corbin. *Resseter v. Waterman,* 151 Ill. 169, 176-7, 37 N.E. 875, 877 (1894); *Illinois Surety Co. v. Munro,* 209 Ill. App. 407, 414-5 (1918).[11] Moreover, in construction and supply contract cases a promise to pay a materialman or supplier of a subcontractor, if the subcontractor fails to pay, has been held to constitute a secondary or collateral undertaking subject to the statute of frauds. *Bonner & Marshall Co. v. Hansell,* 189 Ill. App. 474 (1914); *Jenkins v. Lundgren,* 85 Ill. App. 494 (1899); *Heggie v. Smith,* 87 Ill. App. 141 (1899).

The *Heggie* decision is illustrative of these cases. There, a general contractor responsible for improving a canal had subcontracted to the Geraldine Company the work of removing debris from the channel. Geraldine required certain equipment to perform this work which the plaintiff refused to supply because of uncertainty regarding Geraldine's credit. The managing partner of the general contractor then visited the plaintiff's offices and promised that if the equipment would be furnished the contractor would see that the plaintiff was paid "if Geraldine did not pay." The

[11] Illinois Appellate decisions do not appear in the North Eastern Reporter prior to 1936.

court held the promise to be collateral and within the statute of frauds, stating, at p. 143:

> "The promise, as testified to by appellant, was, that if Geraldine did not pay for the skips, appellees would pay for them. The language standing alone imports simply a collateral undertaking; but further than this, the skips were charged to Geraldine upon the books of appellants; the bills were made out to him, and payment thereof was frequently demanded from him. There was, therefore, a binding and subsisting obligation on the part of Geraldine to appellants, to which the promise of appellees, if made, was collateral. In other words, the party for whom the promise was made, was liable to the party to whom it was made. (*Resseter v. Waterman,* 151 Ill. 169-176, and cases cited.)"

> "This seems to be one of the tests in determining whether the undertaking is original or collateral only. Under the authorities we are clearly of the opinion the promise, if made as claimed, was collateral to the original obligation of Geraldine, and was not binding or enforcible unless made in writing."

In *Heggie* the court emphasized that plaintiff in naming on his books of accounts the subcontractor as his customer and invoicing that customer and making demands for payment upon him, clearly indicated his understanding that the subcontractor was primarily liable. The importance of examining contemporaneous business records to determine the nature of the understanding has been noted in a number of Illinois decisions. See *Lusk v. Throop,* 189 Ill. 127, 133, 59 N.E. 529 (1901), where the Illinois Supreme Court declared, at p. 532:

> "If plaintiff's books show that the defendant was not originally debited there, but that the goods were charged against the person receiving them,

this fact, if unexplained by other circumstances, would be strong evidence going to show that credit was given to the person receiving the goods. . . ."

The same point was made in *Bonner & Marshall Co. v. Hansell,* 189 Ill. App. 474 (1914), the court there declaring, at p. 482-3:

> "Where the price of goods sold and delivered is charged upon the seller's books to the person to whom they are delivered, that fact, if unexplained by other circumstances, is generally considered as strong evidence going to show that credit was given to such person. . . ."
>
> "In this case, it was admitted that appellee did not enter upon its books of account any charge against appellant for the price of the brick that were delivered. It charged the price of the brick directly to Cox Brothers. . . . this evidence, unexplained, tends strongly to prove that at the time of the delivery of the brick, appellee did not consider appellant as primarily its debtor, but intended to collect its claim from Cox Brothers if it could, and regarded the promise of Pray as a guaranty only. * * * This being so, it must be held that the promise of Pray, on behalf of appellant, 'to see that the account was paid' or 'to guarantee the account' was a collateral undertaking to answer for the debt or default of Cox Brothers."

In the present case, following receipt of IMI's purchase order, IMI was described on Mosher's shop records and ledger as its customer for whom the work was being performed and all invoices covering that work were sent to IMI, rather than Graver (Jt.Ex. 13 and 14), (M.Ex. 22-A). But beyond all this it will be remembered that prior to receipt of the IMI-Ward purchase orders, Graver had been shown on Mosher's books and records as the customer for the Davis-Monthan work (Jt.Ex. 12). *Thus, Mosher affirmatively*

acted to change its records to name IMI rather than Graver as the customer in question.

Although Graver's obligation was clearly collateral, the court below found that "Graver acted primarily to protect and advance its own interests under its subcontracts with Fluor and Matich Bros. and Sundt because it had a definite stake in seeing to it that the fabricated steel came to the Tucson and Vandenberg site." (R. 1233). Assuming that to be true, the same observation could be made with equal force in any case involving multiple contractor relationships. However, this circumstance does not remove a contractor's alleged oral guaranty from the statute of frauds.

The Fifth Circuit ruled on this point in *Brown & Root, Inc. v. Gifford-Hill & Company,* 319 F.2d 65, 69 (C.A.5, 1963), stating:

> "In the instant case, the facts as set out above show that the promise of Brown & Root to pay Gifford-Hill, at best, was no more than a promise to pay if Lake Pearl did not."
>
> "The agreement of Brown and Root having been one of guaranty only, the nature and effect of such agreement is not altered because Brown & Root was interested in the resumption of the deliveries of gravel."
>
> *"If the statute of frauds is held to apply only where a promisor guarantees the debt of another in a transaction in which the promisor is completely uninterested, the statute is effectively destroyed. Completely uninterested persons do not guarantee the debts of others."*
>
> * * *
>
> "It follows that appellee may not recover under terms of the oral contract. The judgment of the trial court in appellee's favor is reversed and judgment is here rendered in favor of appellant." (Emphasis Supplied)

The court below similarly emphasized Harle's contacts with Mosher's various officers, (R. 1227-8, 1230-2) but Mosher never contended that Harle's concern as expediter over traffic and delivery problems implied any financial undertaking on Graver's part. The complicated business of multi-million dollar missile site construction necessarily resulted in numberless meetings and negotiations between contractors, subcontractors, suppliers, and materialmen having no direct contractual relationship. In *Fidelity & Deposit Company of Maryland v. Harris,* 360 F.2d 402 (C.A.9, 1966), this Court so observed in similar context, at p. 410:

> "Also, the fact that Dixon's Project Manager had dealings with Paramount's foreman and with Yost throughout their performance of their work does not justify an inference that Dixon had contracted directly with Yost or Paramount. If this inference were permissible, every subcontractor or material supplier who received instructions, information or guidance from the prime contractor would be held to have a direct contractual relationship with the prime contractor. There is an obvious distinction between dealings relating to the performance of his work with a person whose relationship to the prime contractor is too remote for Miller Act coverage, and conversations or conduct from which an inference of a promise to pay would be warranted."

These authorities, we submit, conclusively establish the error of the court below in concluding that the statute of frauds constituted no defense to the oral guaranty claim founded on Moore's testimony. Union's obligation under the putative agreement was contingent upon IMI-Ward's failure to honor its primary obligation to pay for the work it ordered done and, as such, was within the statute of frauds.

(3) Graver Was Not Estopped From Asserting That a Letter of "Final Approval" Was a Condition Precedent to Creation of An Enforceable Guaranty Contract

Plaintiff recognized the statute of frauds problem confronting it in suing on an oral guaranty. In consequence Mosher alleged in count V of its amended complaint that Page falsely represented that Union would guarantee payments for shipments made to the joint venture with the intention of not honoring that promise (R. 275). The trial court made no finding on this particular issue but did state in Finding 44 that other officials of Graver "knew, also, that Mosher was going ahead on the work described in [IMI-Ward's purchase orders] in reliance upon its understanding from Page's assurance on the telephone and his telegram that Graver would pay . . . " (R. 1234-5). The court also concluded that if the sending of the letter mentioned in Page's telegram was a condition precedent to Union's agreement or obligation to pay Mosher, then "Union is estopped to raise the non-performance of the condition as a defense in view of the facts set out in Finding of Fact No. 44 . . ." (R. 1238-9).

Union's officers, of course, were aware that Mosher was proceeding with the joint venture purchase order work, but no evidence exists for concluding that these officers "knew" the work was being performed in reliance upon an alleged promise of oral guaranty. What they "knew," as even Moore concedes, was that final approval of a guaranty remained a matter for their decision. Mosher's willingness to proceed with the joint venture work without final approval and without any further inquiry or expression of interest in a guaranty after November 15 caused these officers to conclude that a guaranty was no longer being required (Jt.Ex. 24).

But assuming *arguendo* that Page had unqualified-

ly promised to send a guaranty letter, which promise Union's officers "knew" was being relied upon by Mosher, this circumstance would create no equitable estoppel under Illinois law. In the case of *Lowenberg v. Booth*, 330 Ill. 548, 555-6, 162 N.E. 191, 195 (1928), the Illinois Supreme Court held that all six elements of actual fraud must appear in order to invoke the doctrine of equitable estoppel:

> "(1) Words or conduct by the party against whom the estoppel is alleged amounting to a misrepresentation or concealment of material facts; (2) the party against whom the estoppel is alleged must have knowledge, either actual or implied, at the time the representations were made, that they were untrue; (3) the truth respecting the representations so made must be unknown to the party claiming the benefit of the estoppel at the time they were made and at the time they were acted on by him; (4) the party estopped must intend or expect that his conduct or representations will be acted on by the party asserting the estoppel or by the public generally; (5) the representations or conduct must have been relied and acted on by the party claiming the benefit of the estoppel; and (6) the party claiming the benefit of the estoppel must have so acted, because of such representations or conduct, that he would be prejudiced if the first party is permitted to deny the truth thereof."

The *Lowenberg* rule was subsequently challenged in *Ozier v. Haines*, 411 Ill. 160, 164-5, 103 N.E. 2d 485, 487-8 (1952), where the appellate court had denied an estoppel because of the non-existence of words or conduct amounting to the misrepresentation or concealment of an existing fact. The Supreme Court refused to weaken its *Lowenberg* decision, stating:

> "Plaintiffs attack the *Lowenberg* case in many different ways, but the substance of all their argument is that the rule therein set forth is too techni-

cal and too general and that its effect is to unduly restrict the application of the doctrine of estoppel."

". . . [I]n effect, their position is such that the promisee's reliance upon an unenforcible promise will validate the promise. To adopt such a view would render the Statute of Frauds useless and unmeaning. It is true that harsh results, or moral fraud as plaintiffs choose to term it, may occur where one has changed his position in reliance upon the oral promise of another, but it is a result which is invited and risked when the agreement is not reduced to writing in the manner prescribed by law."

The issue was once again considered in *Sinclair v. Sullivan Chevrolet Co.*, 45 Ill. App. 2d 10, 195 N.E. 2d 250 (1964), aff'd 31 Ill. 2d 507, 202 N.E. 2d 516 (1964). There the Appellate Court held, at p. 255:

"It is not contended by plaintiff that there was fraud or misrepresentation of fact at the inception of the agreement, merely that defendant did not intend to keep the promises made, when made. This is not sufficient to warrant the application of the doctrine of estoppel."

On appeal, the Illinois Supreme Court again affirmed on the basis of *Lowenberg* and *Ozier,* stating, at p. 518:

"In order to invoked the doctrine of equitable estoppel, there must appear, among other things, words or conduct by the guilty party amounting to a misrepresentation or concealment of a material fact. (*Ozier v. Haines*, 411 Ill. 160; *Lowenberg v. Booth*, 330 Ill. 548.) To be actionable, a false representation must generally relate to an existing or past event, not to a promise or prognostication concerning a future happening (*Brodsky v. Frank,* 342 Ill. 110; *Bielby v. Bielby,* 333 Ill. 478), and although fraudulent intent is not essential to the doctrine of estoppel, these same considerations have prevented its application where an individual is charged with having failed to comply with an oral agreement rendered unenforceable by statute or to honor his

verbal promise to reduce such an agreement to writing. *Ozier v. Haines,* 411 Ill. 160; 37 C.J.S., *Statute of Frauds,* §§ 243 and 247."

"When the instant contract was entered into, there appears to have been no concealment or misrepresentation of fact but mere oral promises concerning future performances which the law did not regard as binding. We hold that the present suit was barred by statute as a matter of law and that the trial court was correct in granting summary judgment for the defendant."

For federal decisions applying Illinois law, see *Repsold v. New York Life Insurance Co.,* 216 F.2d 479, 485-6 (C.A.7, 1954); *North American Plywood Corp. v Oshkosh Trunk & L. Co.,* 263 F.2d 543, 545 (C.A.7, 1959); *Gass v. National Container Corporation,* 171 F. Supp. 441, 445 (S.D., Ill., 1959).

The district court therefore unquestionably erred in concluding that Union was estopped from contending that a letter of "final approval" constituted a condition precedent to the creation of enforceable guaranty contract. The whole purpose of the statute of frauds is to prevent persons from being harassed by claimed oral promises made in the course of negotiations not ending in a contract reduced by writing. The prohibitions of the statute cannot be avoided by the device of attributing an oral promise to a defendant and then charging that it was made with the intention of not performing the same.

We recognize that courts are sometimes reluctant to invoke the statute of frauds when a harsh, technical application of the statute would result in injustice to a diligent creditor who has parted with his property or services in good faith.

That is not the situation in this case. Failure to apply the statute will result in injustice to the claimed guarantor Union, which has already paid the joint ven-

ture for the work for which it is now sued by Mosher, and would be forced to pay twice for the same work, should this judgment be affirmed and Mosher elect to collect it from Union rather than from Ward, the remaining joint venturer.

Mr. Moore's conduct, after he received the telegram guaranteeing payment for the first shipment, indictates that he may have negligently misread that telegram. This he denies, and says that he ignored not receiving the promised letter which was to give "final approval," choosing to rely on Page's oral promise. A curious thing about Mosher's case is the fact that out of the mass of correspondence and other documents, Mosher could not produce to corroborate Moore a single letter, book entry, inter-office memorandum, or even the testimony of a fellow employee, to the effect that Mosher had given a guaranty or made a direct contract with Graver.

Union would have been in a perfect position to protect itself by deductions from the joint venture contract had Mosher's conduct at the time of these transactions only been consistent with its claims and contentions at the trial. Mosher did not even see fit to invoice Graver for the work which it now claims was the subject of a "direct" contract. This contention, like the other complaint theories, obviously was designed to enmesh Graver, through Moore's testimony, in some form of oral bargain whereby plaintiff could recoup the loss caused by the joint ventures default.

The factual and legal situation of the parties demands the application of the Statute of frauds.

POINT II

THE COURT ERRED IN HOLDING THAT AN AGREEMENT EXISTED BETWEEN UNION AND IMI-WARD TO PAY MOSHER OUT OF FUNDS DUE THE JOINT VENTURE

(Specification of error No. 5)

SUMMARY OF ARGUMENT

The court below erred in concluding that Union and IMI-Ward had agreed that Union might pay Mosher for its work after acceptance by IMI-Ward and deduct Mosher's invoices from amounts becoming payable under the second tier subcontract. Such an agreement, if proved, would be subject to the defenses and inherent equities between Union and IMI-Ward. Following the joint venture's default, IMI-Ward had no claim for further payment from Union, and Mosher's claim was subject to the same limitation. Mosher would not be entitled automatically to recover the unpaid balance on the joint venture purchase orders but only to recover for losses sustained by breach of the alleged third party beneficiary contract. No such losses exist because Mosher has now secured a judgment against Ward which defendant is solvent and perfectly able to pay the debt for which it is primarily liable.

In Count VI of its amended complaint Mosher also alleged that Union and IMI-Ward "entered into an agreement for the benefit of Mosher" whereby in consideration of IMI-Ward's performance of its subcontract Union agreed to pay Mosher for its purchase order work out of funds due the joint venture (R. 277). This third party beneficiary count was introduced by amendment as an alternative theory of recovery in the event plaintiff failed to establish the existence of a contract between Mosher and Union. It apparently induced the court below to enter Conclusion of Law 8, which holds that "Union and IMI-Ward agreed that Union might pay Mosher for its work after acceptance of the work by IMI-Ward, and deduct Mosher's invoices from the contract price between Union and IMI-Ward" (R. 1239).

The court's conclusion concerning the existence of such an agreement is completely at odds with the conduct of the parties, which conduct demonstrates that no such agreement was contemplated. In the first place, had such an agreement been reached IMI-Ward would not have invoiced Union for Mosher's work because the joint venture would have expected Union to pay Mosher in the first instance. In fact, the joint venture drew invoices against Mosher's work and assigned such invoices to the California National Bank as security for a line of credit. (U.Ex. IIII, JJJJ, T-Y), (R.T. 555, 594). This conduct would have been a fraud on the bank if the invoices covered payments already relinquished to Mosher. Similarly Union would not have honored the assigned IMI-Ward invoices covering Mosher's work when presented by the bank because the funds for this work would already have been committed to Mosher by reason of the alleged third party beneficiary agreement. In fact, Union did honor the assigned invoices and did pay the bank (U.Ex. IIII), (R.T. 593) — an act which the court below is forced to conclude Union undertook to its own financial injury in the face of a contrary agreement. Finally, Mosher would have billed Union for its work had Page actually advised Moore that Union would pay direct and deduct the money from sums due the joint venture. In fact, Mosher at all times billed the venture (Jt.Ex. 14) and looked to Union for payment on an alleged oral guaranty only after the joint venture's default. This universal disregard by all the parties of the agreement predicated by the court is the best evidence that no such agreement ever existed.

It is true that on December 11 Union received the joint venture's authorization to pay Mosher sums for work of "approximately $225,000" and to deduct such sums from monies falling due under the second tier

subcontract (Jt.Ex. 26, R. 1231). However, the record unequivocally establishes that this authorization letter was sent pursuant to Page's prior advice to the joint venture that a guaranty for Mosher "would be considered only upon the written request of Mr. John which must include an agreement that any payment made by Graver to Mosher would then be withheld from IMI-Ward's progress payments" (U.Ex. K). Page's desire for a written request before even considering the guaranty question was wholly understandable because he did not wish to place Graver in the position of a volunteer. If a guaranty were made and eventually had to be honored, a serious question could arise with respect to Union's right to reimbursement in the absence of joint venture consent to such a guaranty. See *Schuman v. Arsht,* 249 Ill. App. 562, 567 (1928):

> ". . . [A] guarantor is not entitled to indemnity for amounts which he has paid under a guaranty entered into by him voluntarily without the request or knowledge of the principal obligor."

See also Stearns, *Law of Suretyship* (4th Ed.), § 259 at p. 467; *Brandt, Suretyship and Guaranty* (3d Ed.), Vol. I p. 463; 38 C.J.S., *Guaranty,* § 111, at pp. 1299 and 1300.

Page, of course, had already left Union when the joint venture's authorization letter arrived on December 11, and Union's officer's decided against extending a general guaranty on the basis of that letter. Accordingly, there was no offer and acceptance which could create a contract between Union and the joint venture with Mosher as the contemplated third party beneficiary. *Joseph v. Donover Corp.,* 261 F.2d 812, 820 (C.A.9, 1958).

But even if such a contract could be fabricated on the basis of the record, that third party beneficiary con-

tract could never be enforced by Mosher under the circumstances of this case. It is fundamental contract law that a creditor-beneficiary or donee-beneficiary never obtains any better rights under a third party beneficiary contract than those which the promisee, or in this case, the joint venture, would have. See *United States v. Campbell*, 139 F.2d 424, 426 (C.A.4, 1943): "In general, it is true that the rights of a third person to sue on a contract entered into for his benefit are no greater than those of the parties thereto, and the beneficiary who seeks to take advantage of the contract must take it subject to the defenses and inherent equities between the promisor and promisee. *Restatement of Contracts*, §§ 140 and 476(e) [Citations]."

Restatement of Contracts, § 140, states that if a contract ceases to be binding in whole or in part because of the present or prospective failure of the promisee to perform a return promise which was the consideration for the promisor's promise, "the right of a donee-beneficiary or creditor-beneficiary under the contract is subject to the same limitation." As an illustration of this principle, the *Restatement* gives the following example: "B promises A to pay C $100 in consideration of A's promise to B to perform stated services for him. A substantially breaks his promise to perform the services. Whether or not at the time of B's promise C had a right against A to be paid $100 he has no right against B" (Illustration 5).

In the present case *Mosher's invoices did not become payable until after IMI entered bankruptcy* on February 2 and defaulted in the performance of the joint venture subcontract work (Jt.Ex. 14, R.T. 367, 381). At the time of the default there were no monies owing the joint venture under the second tier subcontract and Union had actually over-paid in the amount

of approximately $74,000. Accordingly, there were no monies due and payable which Mosher could recover as a third party beneficiary, and the court erroneously concluded that "the existence of an indebtedness from Union to IMI-Ward against which Union might charge what it paid to Mosher" was not a condition precedent to its obligation to pay (R. 1239).

This error is clearly demonstrated by the decision in *Alexander H. Revell & Co. v. C. H. Morgan Gro. Co.*, 214 Ill. App. 526 (1919) — Illinois law being applicable as the place of alleged contracting. There the Morgan company had entered into a contract with one Lidke, an electrical contractor, to perform certain electrical work and install fixtures at Morgan's premises. During the course of the work the parties entered into an agreement whereby Morgan undertook to pay Lidke's account with his supplier, Revell, out of funds to become due to Lidke for performances of the contract work. Lidke never completed the work and Revell sued Morgan on the agreement contending that the arrangement constituted a third party beneficiary contract. The court held that such a claim simply could not be advanced when the consideration due Morgan, performance of the contract by Lidke, was never received. The court stated, at p. 529:

> "And all the authorities hold that where a contract is entered into by two parties for the benefit of a third, the third party's rights are subject to the equities between the original parties. [Citations.]"

See also *Gallopin v. Continental Casualty Co.*, 290 Ill. App. 8, 7 N.E. 2d 771, 773 (1937). (". . . [I]t is a well recognized principle that where a contract is entered into by two parties for the benefit of a third, the third person's rights are subject to the equities be-

tween the original parties springing out of the transaction between them.") The identical rule of law prevails in Mosher's home jurisdiction. *Citizens National Bank v. Ross Const. Co.*, 146 Tex. 236, 240, 206 S.W.2d 593, 595 (1947).

Finally, and most important, Mosher has suffered no loss by breach of the alleged third party beneficiary contract. Any such contract would have constituted a form of suretyship arrangement. Any claim against Union on this theory, therefore, would arise only because IMI-Ward, which received payment from Union, failed in turn to pay Mosher for the work it had performed for IMI-Ward. However, Mosher has now recovered a judgment against Ward in this action for the full amount due, and Ward is unquestionably solvent and able to satisfy that judgment. This recovery against Ward is sufficient to make Mosher whole for the loss sustained and no further damage remains to warrant a further judgment against Union as a party in the position of a surety under an alleged third party beneficiary contract.

In *Wolters Village Manage. Co. v. Merchants & P. Nat. Bank*, 223 F.2d 793 (CA.5, 1955), the Court of Appeals reversed the entry of judgment on a third party beneficiary claim where the party primarily liable was also a defendant and the plaintiff was able to satisfy his claim against that defendant without resort to the promisor. The Court declared, at p. 799:

> "We are satisfied that all the elements of an enforceable promise for the benefit of a third party were present; that the promise itself was not subject to any conditions; and that it was breached. *Therefore, the Bank may recover. But we think the court below applied an incorrect measure of damages.* The Bank is not necessarily entitled to recover the unpaid balance of its loans to Central,

but only for the losses caused by the breach of contract. *Since it appears that the Bank has other security and it does not appear that the partners Moody and Falck cannot pay the debt for which they are primarily liable, the Bank's recovery must in any event be diminished to the extent that it can recover from those sources.*" (Emphasis added.)

Accordingly, the Court remanded the case to the district court in order to ascertain to what extent, if any, the plaintiff bank would be unable to recover from Moody and Falck as promisees under the third party beneficiary contract before resorting to the promisor Wolters.

In the present case the judgment entered by the court below in effect gives Mosher an option to seek satisfaction only against Union, which has already paid the joint venture for the work in question, or against Ward as the party primarily responsible. No justification exists for this type of option where Ward is solvent and is the only defendant who has not paid on account of the work performed by Mosher.

If Mosher contends it cannot make full recovery from Ward as the party primarily liable, its claim against Union, if not otherwise reversed on the grounds raised in this brief, must still be diminished to the extent that it can recover against Ward and the case must be remanded for that purpose.

POINT III

THE COURT BELOW ERRED IN HOLDING THAT MOSHER WAS NOT ESTOPPED FROM RECOVERING FROM UNION BY REASON OF HAVING SOUGHT AND RECEIVED A DISTRIBUTION IN THE IMI BANKRUPTCY ON THE REPRESENTATION THAT THE WORK PERFORMED WAS AN INDIVIDUAL OBLIGATION OF IMI

(Specification of Error No. 6)

SUMMARY OF ARGUMENT

The final judgment procured by Mosher against IMI in the IMI bankruptcy proceeding constituted an irrevocable election by Mosher to treat the work performed pursuant to the November 3, 1961, purchase orders as the sole and individual obligation of IMI and not as the obligation of the IMI-Ward joint venture or of Union. Having discharged Ward from liability by reason of the position taken in the IMI bankruptcy, such action by Mosher necessarily discharges Union as a party secondarily liable.

On August 9, 1962 Mosher filed a $321,000 proof of claim against IMI in the Chapter XI bankruptcy proceedings in the United States District Court for the Southern District of California, Central Division, on the ground that the work performed pursuant to the November 3 purchase orders was an individual and independent liability of the debtor IMI (U.Ex. D). Attached as an exhibit to the proof of claim were substantiating invoices which declared the purchaser to be "Idaho-Maryland Industries, Inc., 13103 Ventura Boulevard, Studio City, California."

In the sworn claim filed in the IMI bankruptcy proceedings Mosher purported to reserve its rights against Ward and Union, but nowhere asserted that the work in question had been performed either pursuant to an order from the IMI-Ward joint venture or under a direct contract with Union. On December 31, 1963 a final judgment was entered in the Bankruptcy Court which allowed Mosher's claim against IMI in the full amount of $321,053.54 as a "general unsecured claim". The Referee ordered issued to Mosher in settlement of its claim certificates for 32,105 shares of stock in the reorganized IMI company. The value of the stock so distributed was $52,170.62 (R.T. 682).

If Mosher's $321,053.54 proof of claim in fact represented an individual obligation of IMI, then Mosher was entitled to have its claim allowed in full against IMI individually and to share equally with all other individual creditors of IMI in the assets of the debtor. On the other hand, if as Mosher has alleged in this proceeding, the purchase orders underlying its proof of claim created a primary obligation on the part of the joint venture, then under the provisions of Section 5(g) of the Bankruptcy Act, Mosher had only a claim as a creditor of IMI-Ward which should have been subordinated to the claims of individual creditors of IMI and should have received distribution only out of any surplus available after all individual creditors of IMI had been fully paid.[12]

Union submits that by having asserted a share in the individual estate of IMI on an equal basis with other individual creditors, Mosher was estopped in this action to change its position and now claim that the debt was in reality the obligation of IMI-Ward and Union. Having successfully assumed a position in the bankruptcy proceeding in order to advance its private interest, Mosher cannot now, simply because its interest has changed, assert a contrary position which would involve a contradiction of the grounds on which its previously proceeded. *Jamison v. Garrett,* 205 F.2d 15, 17 (App. D.C., 1953) *Essington v. Parish,* 164 F.2d 725, 730

[12] Section 5(g) of the Bankruptcy Act, II U.S.C. § 23, subdivision (g), reads as follows: "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each general partner to the payment of his individual debts. Should any surplus remain of the property of any general partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debs. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be distributed among the individual partners, general or limited, or added to the estates of the general partners, as the case may be, in the proportion of their

(C.A.7, 1947).

This was the exact holding in the Tenth Circuit's decision in *Eads Hide & Wool Company v. Merrill,* 252 F.2d 80 (C.A.10, 1958). In that case Eads filed an unsecured claim in the bankruptcy court against the estate of Chapman, based on two drafts totaling $34,000 which Chapman had drawn on Eads for goods which Chapman failed to deliver. The claim was allowed in full and Eads shared as a general creditor in the distribution of the estate. Thereafter Eads brought a further action against Merrill on the same indebtedness, but now alleged that Chapman and Merrill had been partners in the business operation for which the drafts had been drawn. Eads alleged further that as Chapman's partner, Merrill was jointly and severally liable for the amount of the drafts and that the bankruptcy distribution had been insufficient to satisfy the entire indebtedness.

Merrill contended that Eads was estopped to allege that the indebtedness constituted a partnership liability because Eads had already secured a distribution in bankruptcy on a par with other general creditors only because of Eads' prior position that the debt was the individual responsibility of the bankrupt. But for Eads' prior contrary position Eads would not have been entitled to share in any distribution of the bankrupt's estate until the individual claims had been paid in full because of the provisions of Section 5(g) of the Bankruptcy Act. Having taken the position that Chapman was liable for payment of the amount covered by the drafts in order to secure a share of the bankrupt's estate, Eads could not now take an inconsistent position in order to further his private interest.

The Tenth Circuit affirmed the district court's de-

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respective interests in the partnership and in the order of distribution provided by the laws of the State applicable thereto."

cision holding that Eads had precluded himself from asserting that the obligation was, in fact, a partnership obligation for which Merrill was also responsible. The Court declared, at p. 84:

> "Related to the doctrine of election of remedies or rights, but based upon an inconsistency of position rather than a selection of means of enforcing a right, is a phase of equitable estoppel which prevents a litigant from maintaining that the facts of his suit are different from those which he urged successfully in prior litigation. *Davis v. Wakelee,* 156 U. S. 680, 15 S. Ct. 555, 39 L. Ed. 578;*Queenan v. Mays,* 10 Cir., 90 F.2d 525; *Conklin v. Cunningham,* 7 N.M. 445, 38 P. 170; *Armijo v. Town of Atrisco,* 56 N.M. 2, 239 P. 2d 535. Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."
>
> "Appellant has formerly asserted a right to share in the individual estate of a bankrupt partner on an equal basis with other individual creditors . . . [H]aving thus declared itself to be a creditor of Chapman individually through its acceptance of dividends to the detriment of other general creditors it must be held to be estopped to now claim that the obligation due it was a partnership obligation."

In the *Eads* case the Tenth Circuit also quoted at length from the opinion in *Clapp & Son, Inc. v. Knorr,* 106 Kan. 733, 189 Pac. 935 (1920), where it was held that the plaintiff, in pursuing his claim in the bankruptcy court and in treating the bankrupt as the debtor on an obligation, was therefore estopped from asserting in a subsequent action that the defendant rather than the bankrupt was liable as the actual debtor. The Kansas Court stated, at p. 937:

"Even if Knorr might have been regarded in the

first instance as principal, and Reinhart [the bankrupt] as his agent, the plaintiff, having proceeded against Knorr [sic] as the owner of the goods, and the principal debtor, with full knowledge of the facts, is bound by its election. . . The plaintiff, having procured the adjudication with knowledge of the contract relations, and having accepted dividends from the estate on that theory, is precluded from shifting its position and asserting that Knorr is a principal and a debtor."

These decisions are also in accord with the holding of the Fifth Circuit in *In re Hurley Mercantile Co.*, 56 F.2d 1023 (C.A.5, 1932). In that case a bank procured a judgment against a partnership upon a promissory note executed by the partnership. A judgment was also rendered against the individual partners because of their liability under state law. The bank next filed a claim based upon the judgment against an individual partner in his individual bankruptcy proceeding. In refusing to allow this claim, the Court affirmed the Referee's ruling, stating at p. 1025:

> "The referee's ruling was right. It is true that each partner is individually liable for every partnership debt, but for purposes of bankruptcy the partnership with its property and debts is considered a separate entity from the partners with their several estates and creditors. The Bankruptcy Act requires them to be kept separate for administration, and that partnership assets be first applied to partnership debts. . . Bankr. Act Section 5 (11 U.S.C.A. Section 23). . . . Any other holding would disregard the requirement of Bankr. Act. Section 5(f), 11 U.S.C.A. Section 23(f), that the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each partner to the payment of his individual debts."

See also *Schall v. Camors,* 250 Fed. 6, 8-9 (C.A.5, 1918),

aff'd 251 U.S. 239 (1919); *In re F. J. Hacker & Co.*, 225 Fed. 869, 872 (N.D.Ia., 1915), aff'd 238 Fed. 146 (C.A.8, 1916).

The foregoing authorities demonstrate that the final judgment procured by Mosher against IMI in the IMI bankruptcy proceedings constituted an irrevocable determination, as far as Mosher is concerned, that the work performed pursuant to the November 3, 1961 purchase orders was an individual obligation of IMI and not an obligation created by a "direct" contract with the IMI-Ward joint venture or with Union. Having shared in the individual assets of IMI as an individual creator of that debtor, Mosher cannot now escape the consequence of that position and assert a completely contradictory argument in this case in order to justify a further recovery.

Moreover, Mosher's position in this proceeding is that Union is responsible as a surety or person additionally liable for payment of the debt due from the joint venture. Any act of Mosher which discharges Ward from liability as a member of the joint venture necessarily discharges Union as well. In this regard, Section 44-142 of the Arizona Revised Statutes provides that a judgment shall not be given against a "party not primarily liable unless judgment has been previously, or is at the same time, given against" the principal obligor.[13] This is in accord with the general principle of suretyship that any action by a creditor with relation to the prin-

[13] A.R.S. § 44-142 in full text provides, "*Actions against persons primarily and secondarily liable on bill of exchange or other contract.* The acceptor of a bill of exchange, or any other principal obligor on any contract may be sued either alone or jointly with any other party who may be liable thereon, but judgment shall not be given against such other party not primarily liable unless judgment has been previously or is at the same time, given against the acceptor or other principal obligor, except when the plaintiff discontinues his action against such principal obligator." As to the applicability of this statute, see Footnote 15, infra pp. 69-70.

cipal debtor which prejudices the rights of the surety necessarily discharges the surety from its obligation. See *Atterbury v. Carpenter*, 321 F.2d 921 (C.A.9, 1963); 24 Am.Jur., *Guaranty*, § 87.

These matters were raised by Union in its answer and motion for summary judgment (R.1098, 621). Ward also filed a motion for summary judgment which alleged an estoppel based on the same circumstance (R. 1058). The court below erred in denying these motions and again in holding at the conclusion of the case that the plaintiff was not estopped from asserting its contrary claims in this proceeding after having secured a recovery from IMI individually as the person liable for the plaintiff's debt.

POINT IV

THE COURT BELOW ERRED IN DENYING UNION'S COUNTERCLAIM

(SPECIFICATION OF ERROR NO. 7)

SUMMARY OF ARGUMENT

The court below erred in denying Union's counterclaim which prayed that Mosher be ordered first to seek satisfaction from Ward before proceeding against Union. Union was entitled to this equitable relief as a matter of law because of the principal-surety relationship between these defendants with respect to Mosher's claim. No reason exists for affording Mosher the unrestricted opportunity to compel Union to pay twice on this claim when the principal debtor has thus far avoided all responsibility.

We submit that for the reasons assigned in this brief, the court below erred in entering a money judgment against Union. But in the event this Court should decide differently the fact remains that Mosher has

charged Union as a surety or party secondarily liable for an indebtedness the payment of which remains the primary responsibility of the defendant Ward.

Because of this fact Union filed a counterclaim against Mosher which alleged that under plaintiff's amended complaint Mosher claimed "that defendant Union Tank Car Company became a surety for the obligation of Idaho-Maryland Industries, Inc. and Ward Industries Corporation, a joint venture, and that as such surety this defendant is liable to plaintiff in the sum of $321,053.54" (R. 295). The counterclaim prayed that the court determine the existence of this principal-surety relationship and that in the event Mosher recovers a judgment against both defendants, Mosher be ordered first to seek satisfaction from Ward before proceeding against Union.

Mosher moved to dismiss the counterclaim on the ground that it failed to state a claim upon which equitable relief could be granted (R. 423). After the trial court overruled the motion (R. 1688), plaintiff filed a reply which admitted the principal-surety relationship (R. 617).

For reasons unknown to this defendant the court below made no findings with respect to the counterclaim and failed to dispose of the same when entering its initial judgment on May 24, 1966. This fact was brought to the court's attention, whereupon the clerk, by direction of the court, entered a further judgment on June 20, 1966 (R. 1345) "that the defendant Union Tank Car Company take nothing by its counterclaim." However the court made no findings of fact or conclusions of law. We submit that on the record made in this case the dismissal was erroneous and that Union was entitled to the relief prayed for in its counterclaim.

A. NATURE OF THE RELIEF SOUGHT

The equitable relief sought pursuant to the counterclaim is provided in the Arizona Statutes concerning suretyship, A.R.S. § 12-1642, which states that where an action is brought against two or more defendants on a claim and one or more of the defendants is a surety for the others, upon establishment of that surety relationship any judgment shall be enforced first from the assets of the principal before resorting to the property of the surety.[14] The statute further provides that the remedy made available to the surety exists regardless of how the principal-surety relationship was created. In this connection A.R.S. § 12-1646 states that "The remedy provided in this article for sureties extends to endorsers, guarantors, drawers of bills which have been accepted, and *every other suretyship, whether created by express contract or operation of law.*" (Emphasis supplied.)

The foregoing statutory provisions represent an outgrowth and codification of equitable principles whereby a surety might file a bill to compel a creditor to first sue the principal or to stay execution of any

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[14] A.R.S. § 12-1642 provides: "*Determination of issue between principal and surety; finding for surety and order of levy.* A. When an action is brought against two ore more defendants upon a contract, and one or more of the defendants are surety for the others, the surety may cause the issue of suretyship between the defendants to be tried and determined at any time before the trial, but such proceedings shall not delay the action of the plaintiff. B. If the issue is determined in favor of the surety, the court shall order the sheriff to levy the execution first upon the property of the principal which is subject to execution and situate in the county in which the judgment was rendered before a levy is made upon the property of the surety, if enough property of the principal is found as in the opinion of the sheriff or constable is sufficient to make the amount of the execution, otherwise the levy shall be made on so much property of the principal as is found, if any, and upon so much of the property of the surety as is necessary to make the amount of the execution. The clerk shall make a memorandum of such order on the execution."

judgment against the surety until satisfaction was first sought from the principal. The following are representative statements of this principle:

> "A court of equity, before the surety has paid the debt, and for good cause shown, may at the instance of the surety and for his protection, require the creditor or obligee first to proceed against the principal debtor, . . ."
>
> "In some jurisdictions the equity rule discussed . . . is now embodied in statutes under which the creditor may be required to resort to the property of the principal before proceeding against the surety." 72 C.J.S., *Principal and Surety*, §§ 287(b) and 288(c).
>
> "[T]he courts frequently recognize the right of the surety to go into equity to compell the creditor first to satisfy his execution from property of principal before resorting to that of the surety." 50 Am. Jur., *Suretyship*, § 214.

A related application of the principle was involved in *Wolters* (discussed *supra*, at page 58), holding that where both promisor and promisee are sued on a third party beneficiary contract theory, the promisor is in effect the surety and the beneficiary must first seek satisfaction from the promisee before recovering damages from the promisor. See also cases collected in 4 *Williston on Contracts* (Rev. Ed.), § 1276, at p. 3643.

In the present case Arizona statutory law is applicable with respect to the counterclaim because matters pertaining to the nature of the judgment to be entered in an action are under established conflict of law principles governed by the law of the forum.[15] The statu-

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[15] See 1 Beale, *Conflict of Laws*, § 8 A. 28, at p. 86: "The affording of a remedial right, being independent of the secondary right [i.e., the claim], is a matter solely to be determined by the sovereign from whom the remedy is demanded; in other words, the allowance of a remedy, the

tory remedy is no less available because the present action was brought in a Federal rather than an Arizona state court:

> "[A] federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State." *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945).
>
> "[F]ederal courts should conform as near as may be — in the absence of other considerations — to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule." *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 536 (1958).

B. THE PRINCIPAL-SURETY RELATIONSHIP

In the present cast Union is entitled to the equitable relief prayed for against Mosher under its counterclaim because the principal-surety relationship was not denied in Mosher's reply and was unquestionably proved during the course of the trial. Under its subcontract with Union the joint venture was legally obligated to perform the blast lock and levels 2 and 3 steel fabrication for the eighteen Titan missile silos at Davis-Monthan and for the five Titan missile silos at Vandenberg (Jt.Ex. 8). This was the work subcontracted to Mosher by the joint venture pursuant to their November 3, 1961 pur-

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methods of carrying on the suit, the judgment, and the execution, are matters entirely for the law of the forum sought by the complaining party." To the same effect see *Rest., Conflict of Laws*, § 600, p. 717: "The law of the forum determines matters pertaining to the execution of a judgment and what property of a judgment defendant within the state is exempt from execution and on what property within the state execution can be levied, and the priorities among competing execution creditors."

chase orders (Jt.Ex. 9 and 10). Subsequently, the joint venture issued and assigned its invoices covering the blask lock and levels 2 and 3 fabrication work to the United California Bank, and Union honored them and paid that bank for the items of work in question.

The record further establishes that while Union paid IMI-Ward's assignee for the work completed by Mosher, the joint venture has never paid its indebtedness to the plaintiff except to the extent of the $55,328.00 distribution made in the IMI bankruptcy. Moreover, both IMI and Ward by terms of their second tier subcontract with Union expressly agreed to hold Union harmless from any and all claims arising from work or materials furnished under that subcontract (Jt. Ex. 8). Therefore, as between Union and Ward, as a member of the joint venture, the latter is clearly responsible in the first instance for the payment of plaintiff's claim.

See 4 *Williston on Contracts* (Rev. Ed.) § 1211, at p. 3482, ". . . [I]f two persons are liable for the same debt or loss, and it is just that one of them should ultimately bear the burden wholly or beyond his share, that person is a principal and the other is a surety. . . ." Compare Rest., *Security*, § 82: "Suretyship is the relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and, as between the two who are bound, one rather than the other should perform." Nor does the existence of this principal-surety relationship depend upon whether Mosher is suing Union as a principal or a guarantor, because whether a party is a surety "depends not on his relation to the creditor but on his relation to the principal debtor." *Williston on Contracts* (Rev. Ed.) § 1211, at p. 3485; 72 C.J.S., *Principal & Surety*, § 32, at p. 527.

These circumstances certainly constitute good cause for granting the relief prayed for in Union's counterclaim. This Court is not confronted with a situation where Mosher has proceeded solely against a party secondarily liable, in which case granting the relief requested might unreasonably delay the plaintiff in securing recovery. Mosher has proceeded simultaneously against both Union and Ward and has now secured a judgment against each, which, if affirmed, can readily be satisfied from the assets of the defendant primarily responsible for payment. In equity and good conscience no reason can exist for affording Mosher an unrestricted opportunity to compel Union to pay twice on a claim for which the principal debtor has thus far avoided all responsibility whatsoever.

C. DUTY OF THE COURT TO ENTER FINDINGS AND CONCLUSION

Rule 52(a) of the Federal Rules of Civil Procedure provides in part:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon . . ."

The United States Supreme Court on considering Rule 52 findings of facts by a district court stated:

> "[C]onclusory, general findings do not constitute compliance with Rule 52's direction to 'find the facts specially and state separately . . . conclusions of law thereon.' While the standard of law in this area is not a complex one, we four think the unelaborated finding of ultimate fact here cannot stand as a fulfillment of these requirements. *It affords the reviewing court not the semblance of an indication of the legal standard with which the trier of fact has approached his task." Commis-*

sioner of Internal Revenue v. Duberstein, 363 U.S. 278, 292-293 (1960). (Emphasis added).

The Ninth Circuit in *Irish v. United States*, 225 F.2d 3, 8 (C.A.9, 1955) stated:

> "Findings of fact are required under Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A. The findings should be so explicit as to give the appellate court a clear understanding of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision."
>
> * * *
>
> "In a case where the necessary findings are lacking on the appeal, the court does not dismiss the appeal, but vacates the judgment and remands the case to the district court for appropriate findings of fact."

The same principle applies when a counterclaim is involved. The court in *Island Construction Company v. Danielson*, 316 F.2d 161, 163 (C.A.3, 1963) said:

> "But the Court made no findings of fact whatever concerning the transactions and events out of which this counterclaim arises, although Rule 52(a), Federal Rules of Civil Procedure, plainly contemplates and requires such findings, *Kruger v. Purcell*, 3rd Cir., 1962, 300 F.2d 830. There is merely a statement in the court's conclusion of law 'that the defendant is entitled to nothing as against the plaintiff on the basis of the counterclaim'. Without findings covering the essential facts, we cannot know the basis of the court's conclusion that the counterclaim fails and, therefore, are not in position to review the merits of this matter. This part of the case must, therefore, be remanded for futher proceedings."

Union's counterclaim was denied but no findings of fact or conclusion of law were entered to support this denial. A total lack of findings and conclusions does

not afford the reviewing court any indication of the legal standard with which the trier of fact approached his task. *Commissioner of Internal Revenue v. Duberstein, supra.* Nor is a bare order denying relief "so explicit as to give the appellate court a clear understanding to the trial court's decision," or to enable the appellate court to determine the ground on which the trial court reached its decision. *Irish v. United States, supra.*

The record amply demonstrates that Ward, as the remaining member of the joint venture, is the party primarily liable for Mosher's claim, while Union, if liable at all, is secondarily liable. The judgment denying relief on the counterclaim should therefore be reversed. If Mosher's judgment is sustained as to both appellants, then the case should be remanded for judgment to be entered requiring that plaintiff enforce its claim against the assets of Ward.

CONCLUSION

For each of the foregoing reasons, appellant Union Tank Car Company respectfully prays that the judgment entered May 24, 1966, by the United States District Court for the District of Arizona sitting at Tucson, Arizona, be reversed as to this appellant, in which event the appeal from the court's judgment of June 20, 1966, denying this appellant's counterclaim will become moot. If there is not a reversal as to this appellant, then we submit that the case should be remanded to the District Court for appropriate further proceedings on this appellant's counterclaim and to determine what portion of Mosher Steel Company's claim is collectible against Ward Industries Corporation as the party primarily liable.

This appellant further prays that it be awarded its costs of suit.

Respectfully submitted,

HAROLD C. WARNOCK
THOMAS C. McCONNELL
JOHN BORST, JR.
BOYLE, BILBY, THOMPSON
& SHOENHAIR

By *Harold C. Warnock*
Attorneys for Appellant Union
Tank Car Company

9th Floor
Valley National Building
Tucson, Arizona 85701

CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Harold C. Warnock
Of Counsel

APPENDIX

JOINT EXHIBITS

COUNSEL STIPULATED BEFORE TRIAL THAT JOINT EXHIBITS 1 THROUGH 82 MAY BE MARKED IN EVIDENCE. JOINT EXHIBITS 1 THROUGH 82, EXCLUSIVE OF 33 AND 36 WERE MARKED IN EVIDENCE.

Exhibit No.	Identified
1	
2	525 *et. seq.*
3	
4	
5	
6	433 *et. seq.*
7	
8	218 *et. seq.*, 469 *et. seq.*, 546 *et. seq.*, 607 *et. seq.*, 902 *et. seq.*
9	94 *et. seq.*, 152 *et. seq.*, 166 *et. seq.*, 170 *et. seq.*, 198 *et. seq.*, 304 *et. seq.*, 439 *et. seq.*, 445 *et. seq.*, 454 *et. seq.*, 797 *et. seq.*, 861 *et. seq.*, 935 *et. seq.*
10	94 *et. seq.*, 141 *et. seq.*, 152 *et. seq.*, 166 *et seq.*, 198 *et. seq.*, 304 *et. seq.*, 439 *et. seq.*, 445 *et. seq.*, 454 *et. seq.*, 797 *et. seq.*, 861 *et. seq.*, 935 *et. seq.*
11	
12	79 *et. seq.*, 250 *et. seq.*, 351 *et. seq.*
13	137 *et. seq.*, 141 *et. seq.*, 148 *et. seq.*, 275 *et seq.*, 1049 *et. seq.*
14	125 *et. seq.*, 375 *et. seq.*, 380 *et. seq.*, 433 *et. seq.*
15	
16	
17	127 *et. seq.*, 347 *et seq.*, 385 *et. seq.*, 445 *et. seq.*
18	347 *et. seq.*, 384 *et. seq.*, 444 *et. seq.*
19	507 *et. seq.*
20	
21	526 *et. seq.*

325 *et. seq.*, 363 *et. seq.*, 411 *et. seq.*, 530 *et. seq.*, 699 *et. seq.*

540 *et seq.*, 762 *et. seq.*

538, *et. seq.*, 903 *et. seq.*

524 *et. seq.*, 540 *et. seq.*, 725 *et. seq.*, 812 *et. seq.*

875 *et. seq.*

896 *et. seq.*

842 *et. seq.*

844 *et. seq.*

101 *et. seq.*, 144 *et. seq.*

723 *et. seq.*, 768 *et. seq.*

132 *et. seq.*, 199 *et. seq.*, 271 *et. seq.*, 912 *et. seq.*

112 *et. seq.*

112 *et. seq.*

112 *et. seq.*

112 *et. seq.*

112 *et. seq.*, 432 *et. seq.*

112 *et. seq.*

112 *et. seq.*, 407 *et. seq.*

96 *et. seq.*, 274 *et. seq.*
922 *et. seq.*

272 *et. seq.*

122 *et. seq.*, 317 *et. seq.*, 365 *et. seq.*

PLAINTIFF'S EXHIBITS

Exhibit No.	Identified	Offered	Rejected	Received
1	p. 68 p. 200	p. 69	p. 70	 p. 256
2	p. 99	p. 273		p. 274
3				
4		p. 329		p. 329
5		p. 329		p. 329 p. 344
6	p. 376	p. 376		p. 377
7	p. 275	p. 275		p. 276
8		p. 801 (Def. Union's QQQQ)		p. 801
9				
10				
11				
12				

13				
14				
15				
16				
17				
18				
18				
20	p. 201	p. 203	p. 203	
21				
22	p. 68			
22-1	p. 100 (Changed to 22-A)			p. 101
23	p. 680	p. 680		p. 680
24	p. 385	p. 385		p. 387
25				
26		p. 682		p. 1054
27				
28				
29				
30				p. 1056
31	p. 67			
	p. 72			
	p. 198	p. 200-201	p. 1054	
32	p. 67			
	p. 87	p. 87		p. 88
33	p. 67			
34	p. 300			
35	p. 472			
36	p. 484			
37	p. 652			
38	p. 656	p. 656		p. 656
39	p. 657			
40	p. 658	p. 658		p. 658
41	p. 661			
42	p. 666			
43	p. 669			
44	p. 893			

EXHIBITS OF DEFENDANT UNION TANK CAR COMPANY

Exhibit No.	Identified	Offered	Rejected	Received
A		p. 948		p. 949

B	p. 949		p. 949
C	p. 421	p. 421	
	p. 729		p. 729
D	p. 428		p. 428
E	p. 426		p. 426
F	p. 949		p. 949
G	p. 512		p. 512
H	p. 950	p. 951	
I	p. 951		p. 951
J			
K			p. 517
L	p. 522		p. 522
M			p. 515
N	p. 951		p. 952
O			
P	p. 884		p. 885
Q			
R			
S	p. 952		p. 954
T	p. 954		p. 955
U	p. 955		p. 957
V	p. 955		p. 957
W	p. 955		p. 957
X	p. 955		p. 957
Y	p. 955		p. 957
Z	p. 957		p. 958
AA	p. 955		p. 959
BB	p. 959		p. 960
CC	p. 960		p. 960
DD			
EE			
FF			
GG	p. 882		p. 833
HH	p. 960		
II			p. 591
JJ			
KK			
LL	p. 714		p. 716
MM	p. 962		p. 963
NN			
OO			

PP				
QQ				
RR				
SS				
TT		p. 713		p. 713
UU		p. 963		
VV		p. 618		p. 619
WW		p. 966	p. 966	
XX		p. 620		p. 620
YY				
ZZ		p. 614 p. 966		p. 614
AAA		p. 560		p. 562
BBB				
CCC				
DDD				
EEE				
FFF				
GGG				
HHH				
III				
JJJ				
KKK				
LLL		p. 967		p. 968
MMM				
NNN		p. 968		p. 969
OOO				
PPP		p. 969		p. 971
QQQ				
RRR				
SSS				
TTT				
UUU		p. 140		
VVV	p. 138	p. 972		p. 140
WWW	p. 138	p. 140 p. 972		p. 140
XXX	p. 138	p. 140 p. 972		p. 140
YYY	p. 138	p. 140		p. 140
ZZZ	p. 138	p. 140		p. 140
AAAA	p. 398	p. 401		p. 402

BBBB	p. 508	p. 510		p. 516
CCCC	p. 550	p. 555		p. 556
DDDD	p. 556	p. 560		p. 562
EEEE	p. 562	p. 569		p. 570
FFFF	p. 565	p. 569		p. 570
GGGG	p. 577			p. 583
HHHH	p. 586			p. 588
IIII		p. 590		p. 591 as II
JJJJ				p. 593
KKKK		p. 971	p. 972	
LLLL				
MMMM				
NNNN		p. 618		p. 619
OOOO				
PPPP		p. 621		p. 621
QQQQ (formerly P-8)		p. 801		p. 801
RRRR	p. 885	p. 886-887		p. 886-887
SSSS	p. 1009	p. 1012		p. 1012
TTTT	p. 1009	p. 1012		p. 1012
UUUU	p. 1009	p. 1010		p. 1010-11
VVVV	p. 1009	p. 1012		p. 1012
WWWW				
XXXX				
YYYY				
ZZZZ				

EXHIBITS OF DEFENDANT WARD INDUSTRIES CORP.

Exhibit No.	Identified	Offered	Rejected	Received
A		p. 840		p. 842
A1		p. 840		p. 842
A2		p. 840		p. 842
A3		p. 840		p. 842
A4		p. 840		p. 842
B		p. 842		p. 842
B1		p. 842		p. 842
B2		p. 842		p. 842
B3		p. 842		p. 842

B4	p. 842	p. 842
C		
D		
E	p. 1047	p. 1047
F	p. 163	p. 163
G		
H		
I		
J	p. 842	p. 842
K		p. 1044
L	p. 1033	p. 1034
M		
N	p. 431	p. 431
O	p. 442	p. 442
P	p. 840	p. 842
Q		
R		
S		
T		
U		
V		
W		
X		
Y		
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